

CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 70

MITSUYE ENDO

vs.

**MILTON EISENHOWER, DIRECTOR OF WAR RELO-
CATION AUTHORITY AND WARTIME CIVILIAN
CONTROL ADMINISTRATION**

**ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT**

FILED APRIL 25, 1944.

No. 10605

United States
Circuit Court of Appeals
For the Ninth Circuit.

MITSUYE ENDO,

Appellant,

VS.

MILTON EISENHOWER, Director of War Relocation Authority and Wartime Civilian Control Administration,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States in and
for the Northern District of California, South—
ern Division

23688-S

In the Matter of the Application of

MITSUYE ENDO

For a Writ of Habeas Corpus

**PETITION FOR A WRIT OF HABEAS
CORPUS**

To the Honorable, the District Court of the United
State of the Northern District of California

The Petition of Mitsuye Endo respectfully shows:

I.

That your petitioner was born on the 10th day of
May, 1920, in the city of Sacramento, County of
Sacramento, State of California, United States of
America.

II.

That at the time of her birth and ever since said
petitioner has been and now is subject to the ju-
risdiction of the United States of America and of
no other country.

III.

That at all times said petitioner has been and
now is a loyal citizen of the United States of
America, and owes allegiance to and is a citizen
of no other country. [1*]

IV.

That Kunio Endo, the brother of your petitioner, is at the present time a soldier in the military forces of the United States of America.

V.

That at the present time your petitioner is confined in a certain concentration camp known as Newell, located in Modoc County, State of California and within the jurisdiction of this Court.

VI.

That your petitioner is confined in said concentration camp under armed guard, and is detained there against her will.

VII.

That by reason of said detention, said petitioner is deprived of her liberty.

VIII.

That your petitioner is informed and believes and therefore alleges that she is confined, detained and imprisoned in said concentration camp known as Newell, by Milton Eisenhower, the director of the War Relocation Authority and the director of the Wartime Civilian Control Administration; that your petitioner is informed and believes and therefore alleges that said confinement and said imprisonment is maintained by and in accordance with the orders of J. L. Dewitt, Lieutenant-General, United States Army, Commanding military area, number One, and Colonel Carl. R. Bendetsen, Assistant

Chief-of-Staff, Western Defense Command, Fourth Army, and officer in charge of the evacuation under the Wartime Civil Control Administration and E. R. Fryer, Regional Director of the War Relocation Authority and C. E. Rachford, Camp Director of the War Relocation Authority and in charge of Camp Newell in Modoc County in the State of California. [2]

IX.

That your petitioner is informed and believes and therefore alleges that said concentration camp known as Newell is under the joint command, management and control of said War Relocation Authority and the officers and members thereof, and said Wartime Civilian Control Administration, and the officers, members and directors thereof and the persons heretofore named.

X.

That your petitioner is informed and believes and therefore alleges that the sole reason for detention of said petitioner is that she is an American citizen of Japanese ancestry.

XI.

That your petitioner has been so imprisoned without any process or color of law whatsoever, that none such is pretended by those detaining her; that your petitioner alleges that no warrant or process of any court, magistrate, or other person having legal authority to issue the same exists to justify said arrest and imprisonment, but to the contrary,

the imprisonment as above stated has been without color of law and in violation of the constitution and the laws of the United States of America of which she is a citizen; that no charge has ever been made against said petitioner; that petitioner has never been informed of any other reason for which she is being held; that no hearing has ever been granted to said petitioner.

XII.

That said petitioner is not, and never has been a member of the military forces of the United States and is not subject to military law.

(1) that martial law has not been declared;

(2) that all courts in and of the State of California [3] are open and sitting and available to any party charging petitioner with crime or wrong doing.

XIII.

That said petitioner in October, 1941, became a probationary Civil Service employee of the State of California; that thereafter for a period of six months during said probationary period the officials of the State of California investigated petitioner's qualifications for her position as a Civil Service Employee and investigated her efficiency and fitness and moral responsibility.

XIV.

That thereafter said officials certified said petitioner as a permanent Civil Service Employee, and said petitioner retained said position and classification until on or about the 7th day of April, 1942.

XV.

That on or about the 7th day of April, 1942 the Personnel Board of the State of California suspended your petitioner from her position as a Civil Service Employee of said State of California and gave as one of the reasons for said suspension that your petitioner was subject to being evacuated and consequently would be unable to perform the duties of her position.

XVI.

That thereafter said Personnel Board filed supplementary charges against your petitioner and stated that said petitioner had been evacuated and was confined and detained and was unavailable to perform her duties as a Civil Service Employee; that unless your petitioner is able to establish that she is not subject to said detention the Civil Service standing of said petitioner will be imperiled; that said Civil Service standing constitutes and is a vested property right. That the acts of [4] said parties named in confining petitions will result in the deprivation of said property.

XVII.

That each of said persons now detaining said petitioner at said War Relocation Center known as Newell, located in Modoc County, State of California, professes to act under the color of and by the authority of the United States.

XVIII.

That no other application for a Writ of Habeas Corpus in this matter, on the grounds and facts

herein asserted, has been made to this or any other court by Petitioner, or any one on her behalf.

Wherefore, your Petitioner prays:

That a Writ of Habeas Corpus issue out of, and under the seal of the above entitled Court, directed to said J. L. Dewitt, Lieutenant-General, United States Army, Commanding military area, number One, and Colonel Carl R. Bendetsen, Assistant Chief-of-Staff, Western Defense Command, Fourth Army, and officer in charge of the evacuation under the Wartime Civil Control Administration and E. R. Fryer, Regional Director of the War Relocation Authority and C. E. Rachford, Camp Director of the War Relocation Authority and in charge of Camp Newell in Modoc County in the State of California, and the servants, agents, employees and subordinates of each of said parties, commanding them and each of them to produce the body of petitioner before the above entitled court on a day to be specified in said writ and before the Honorable A. F. St. Sure, judge thereof, with the cause, if any they may have for her arrest and detention, and that your petitioner be discharged and restored to liberty and bring with them this said writ.

MITSUYE ENDO,

Petitioner.

JAMES C. PURCELL,

Attorney. [5].

United States of America,

State of California,

County of Modoc—ss.

Mitsuye Endo, being first duly sworn, deposes and says:

That she is the Petitioner named in the foregoing Petition; that she has read the foregoing Petition and knows the contents thereof, that the same is true of her own knowledge except those matters therein stated on information and belief, and as to such matters she believes it to be true.

MITSUYE ENDO,

Petitioner.

Subscribed and sworn to before me this
day of, 1942.

Notary Public in and for the City of

County of Modoc, State of California. [6]

State of California,

City and County of San Francisco—ss.

James C. Purcell, being first duly sworn, deposes and says:

That he is an attorney at law, admitted to practice in all of the Courts of the State of California, and in the District Court of the United States in and for the Northern District of California, Southern Division:

That prior hereto, one Mitsuye Endo retained James C. Purcell as her attorney, and requested said James C. Purcell to file for her a petition for writ of Habeas Corpus, setting forth that said

Mitsuye Endo is now illegally confined in a certain camp known as Newell, located in Modoc County, State of California, in accordance with the orders of J. L. DeWitt, Lieutenant-General, United States Army, Commanding military area, number One, and Colonel Carl R. Bendetsen, Assistant Chief-of-Staff, Western Defense Command, Fourth Army, and officer in charge of the evacuation under the Wartime Civil Control Administration and E. R. Fryer, Regional Director of the War Relocation Authority and C. E. Rachford, Camp Director of the War Relocation Authority and in charge of Camp Newell in Modoc County in the State of California:

That prior hereto, in accordance with the instructions of said Mitsuye Endo, your affiant prepared a petition for writ of Habeas Corpus, the original of which accompanies this affidavit and which is referred to and incorporated herein by reference thereto as though the same were herein specifically set forth;

That your affiant mailed said original petition for writ of habeas corpus to said Mitsuye Endo at Camp Newell, Tule Lake, Modoc County, State of California, with the request that said Mitsuye Endo sign said petition and sign the verification thereto before a Notary Public; [7]

That thereafter your affiant received a letter from said Mitsuye Endo informing your affiant that she was unable to have said signature notarized by a notary public, by reason of the fact that the two (2) notary publics in said Camp were notary pub-

lies in, and for the County of Sacramento, and were not authorized to administer oaths in the County of Modoc;

That your affiant knows the signature of said Mitsuye Endo and said signature appearing upon said petition and the verification thereof is the signature of Mitsuye Endo, the petitioner named therein;

That the law offices of your affiant are maintained in the City and County of San Francisco, State of California; that said Mitsuye Endo, your affiant's client, is at the present time outside of the City and County of San Francisco, and as heretofore stated is confined in a camp in Modoc county, State of California; that your affiant is informed and believes and therefore alleges that each, every, and all of said allegations contained in said Petition are true.

JAMES C. PURCELL.

Subscribed and sworn to before me this 13th day of July, 1942.

[Seal]

MARION M. BENDER,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires November 20, 1943.

[Endorsed]: Filed Jul. 13, 1943. [8]

[Title of District Court and Cause.]

AFFIDAVIT OF ELMER L. SHIRRELL

State of California.

County of Modoc—ss.

Elmer L. Shirrell, being first duly sworn on oath, deposes and says that at all times material to this action he was, and is, an employee of the War Relocation Authority and the duly appointed, qualified and acting Project Director of the Tule Lake War Relocation Center located at Newell, Modoc County, California:

That the petitioner, Mitsuye Endo, is a person of Japanese ancestry and was removed to said Tule Lake War Relocation Center pursuant to the authority of Executive Order No. 9066 promulgated by the President of the United States of America on February 19, 1942, and pursuant to the Public Proclamation of Lieutenant General J. L. DeWitt, Commanding General of the Western Defense Command and Fourth Army, promulgated pursuant to and under authority of Executive Order No. 9066; and that said petitioner at all times material to this action has been, and now is, residing within said Tule Lake War Relocation Center.

That the Director of the War Relocation Authority has issued regulations providing that persons residing in Relocation Centers might apply for leave to depart from said Relocation Centers, which include the said Tule Lake War Relocation Center.

That said regulations provide for the following types of leave:

(a) A short term leave, for not more than thirty days, for attending to affairs requiring the applicant's presence outside the relocation area; [9]

(b) A leave to participate in a work group, for employment and residence with a group of center residents outside the relocation area, or for such employment with residence remaining within the relocation area; and

(c) An indefinite leave, for employment, education or indefinite residence outside the relocation area.

Said regulations further provide that any person residing within a Relocation Center may apply for leave:

That in every case of an application for leave the Project Director of the Relocation Center where the applicant resides is required, by said regulations, to review such application; and that the affiant does personally review every application for leave made by persons residing at the said Tule Lake War Relocation Center.

That said regulations promulgated by the Director of the War Relocation Authority in Washington, D. C., on September 26, 1942 were filed with the Federal Register on September 28, 1942 and were published in the Federal Register on September 29, 1942, on pages 7656-7658 inclusive; and that by reason of such publication affiant is informed and believes the petitioner, Mitsuye Endo, had constructive notice of the existence of said regulations and the contents thereof.

That a digest of the contents of said regulations was published in the "Daily Tulean Dispatch", a newspaper of general circulation within the limits of the said Tule Lake War Relocation Center, on October 14, 1942; and that on information and belief the contents of said regulations are a matter of common knowledge among the persons residing within the said Tule Lake War Relocation Center.

That despite the existence of said regulations, said petitioner, Mitsuye Endo, at no time has made application [10] to the affiant, in his capacity as Project Director or otherwise, or to any of the members of his staff, for leave to depart from said Relocation Center under the terms of the said regulations.

That this affidavit is made for the purpose of advising the court of the facts surrounding the petitioner's status since the promulgation of said regulations.

(Sgd) ELMER L. SHIRRELL.

Subscribed and sworn to before me this 23rd day of November, 1942.

(Signed) [Seal] HELEN HALEY THOMAS,

Notary Public in and for the County of Modoc,
State of California.

My Commission Expires June 29, 1946.

[Endorsed]: Filed Jan. 7, 1943. [11]

[Title of District Court and Cause.]

AFFIDAVIT OF JAMES C. PURCELL

State of California,

City and County of San Francisco—ss.

James C. Purcell, being first duly sworn, deposes and says: That he is one of the attorneys for Mitsuye Endo; that Mitsuye Endo was and is a resident of the City of Sacramento, County of Sacramento, State of California; that she is now confined to that certain concentration camp known as Tule Lake War Relocation Center;

That there has been heretofore filed in the above entitled action an affidavit of Elmer L. Shirrell, setting forth that said Mitsuye Endo has failed to file her application for leave to depart from said Relocation Center; that your affiant is informed and believes and therefore alleges that said regulations make no provision for the return of said Mitsuye Endo to her place of residence, to wit, Sacramento, California, where she was heretofore employed as a Civil Service Employee of the State of California, and your affiant is further informed and believes and therefore alleges that to make application to return to said City of Sacramento, State of California, would be a useless act upon the part of Mitsuye Endo; [12]

That your affiant is informed and believes and therefore alleges that said Mitsuye Endo is confined in said concentration camp known as Tule Lake War Relocation Center against her will and has been and now is refused the right to return to

her place of residence where she was heretofore employed.

JAMES C. PURCELL

Subscribed and sworn to before me this 31st day of January, 1943.

[Seal]

WALTER E. McGUIRE,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Feb. 19, 1943: [13]

In the District Court of the United States in and for the Northern District of California, Southern Division

In the Matter of the Application of

mitsuye ENDO

For a Writ of Habeas Corpus

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

In the above-entitled cause it appearing upon the face of the petition that petitioner is not entitled to a writ of habeas corpus, and it further appearing that she has not exhausted her administrative remedies under the provisions of Executive Order No. 9102 (7 Fed. Reg. 2165) and the regulations promulgated thereunder.

It Is Therefore Ordered that the petition for

writ of habeas corpus be, and the same is, hereby denied.

Dated: July 2, 1943.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Jul. 2, 1943. [14]

In the District Court of the United States in
and for the Northern District of California,
Southern Division

In the Matter of the Application of

MITSUYE ENDO

For a Writ of Habeas Corpus

NOTICE OF APPEAL

To the Clerk of the said District Court and to Frank
J. Hennessy, Esq., United States Attorney for
the Northern District of California:

Notice Is Hereby Given that Mitsuye Endo, the
petitioner in the above-entitled cause, appeals to the
United States Circuit Court of Appeals for the
Ninth Circuit, from the judgment of the District
Court of the United States, in and for the North-
ern District of California, in the cause entitled as
above, denying the petition of said Mitsuye Endo
for a Writ of Habeas Corpus, which said judg-
ment was given and made in and by said District

Court the 2nd day of July, 1943, and which is in the words and figures following, to-wit:

"Order Denying Petition for Writ of Habeas Corpus.

In the above entitled cause, it appearing upon the face of the petition that petitioner is not entitled to a writ of habeas corpus, and it further appearing that she has not exhausted her administrative remedies under the provisions of Executive [15] Order #9102 (7 Fed. Reg. 2165) and the regulations promulgated thereunder.

It is therefore ordered that the petition for writ of habeas corpus be, and the same is hereby denied.

Dated July 2, 1943.

(Signed) **MICHAEL J. ROCHE,**

U. S. District Judge."

The said Mitsuye Endo appeals from the whole of said judgment.

Dated August 16, 1943.

MITSUYE ENDO,

Petitioner and Appellant.

JAMES C. PURCELL,

Attorney for Petitioner and Appellant.

[Endorsed] Filed Aug. 26, 1943. [16]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

To the Clerk of the Said District Court:

The above named appellant, Mitsuye Endo, has this day filed her notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of the said District Court, in the cause entitled as above, denying her petition for a Writ of Habeas Corpus, and does hereby designate as the portions of the record and proceedings and evidence to be contained in the record on said appeal the following, to wit:

1. The Petition for a Writ of Habeas Corpus;
2. The Affidavit of Elmer L. Shirrell;
3. The Affidavit of James C. Purcell;
4. The order of the Court dated July 2, 1943, denying the Writ of Habeas Corpus;
5. Notice of Appeal.

Dated this day of August, 1943.

JAMES C. PURCELL,

Attorney for Appellant.

Service admitted this 31st day of August, 1943.

FRANK J. HENNESSY,U. S. Attorney, Attorney for
Appellee.

[Endorsed]: Filed Aug. 31, 1943. [17]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The appellant has designated for inclusion in the Transcript on Appeal the complete record and proceedings in the above-entitled cause in said district; nevertheless, pursuant to the provisions of Subdivision D of Rule 75 of the Rules of Civil Procedure for the District Courts of the United States, appellant files this statement of the points on which she intends to rely on appeal:

(1) That your petitioner, being a citizen of the United States and not a member of the land or naval forces of the United States, is and was at the time of the filing of the petition herein imprisoned and restrained of her liberty in a certain concentration camp in the state and district aforesaid, by the War Relocation Authority in accordance with a certain purported order issued by J. L. De Witt, Lieutenant General of [18] the United States Army, commanding the military forces of the United States, within the State and District aforesaid; that there is neither insurrection nor invasion within the said State and District, and that all of the civil courts both State and Federal have at all times been and still are open for the transaction of judicial business, and at all times have been and now are performing all the powers and functions conferred upon them by the Constitution and the Laws of the United States of America, and are not and have been without interruption engaged in the trial of all causes, civil, criminal,

and maritime, that have or may properly come before them, and that juries, both grand and petty are now and at all times have been in attendance upon this court and upon all other courts of general jurisdiction both State and Federal in the State and District aforesaid; that appellant is an American citizen and has at all times borne full and true faith and allegiance to the United States of America; that no indictment or presentment has ever been returned or filed against appellant by the Grand Jurors of the United States of America in and for the District aforesaid, or elsewhere, that no complaint has ever been filed with any judge, commissioner, or other magistrate of the United States or of the State of California, charging appellant with any crime, and that by reason of all and singular the premises, appellant is unlawfully imprisoned and restrained of her liberty and is deprived of her liberty without due process of law; and that by the judgment of the said District Court, appellant has been denied the privilege of a writ of habeas corpus; all of which matters and things from the petition for a writ of habeas corpus and the affidavit on file herein fully and at large appear.

JAMES C. PURCELL,

Attorney for Appellant.

(Admission of Service.)

[Endorsed]: Filed Aug. 31, 1943. [19]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant may have to and including November 4, 1943, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: September 25, 1943.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Sep. 25, 1943. [20]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 20 pages, numbered from 1 to 20, inclusive, contain a full, true, and correct transcript of the records and proceedings in the Matter of the Application of Mitsuye Endo, for a Writ of Habeas Corpus, No. 23688 S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Three Dollars and Fifty Cents

(\$3.50) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 9th day of October, A. D. 1943.

[Seal]

C. W. CALBREATH,

Clerk.

By E. VAN BUREN,

Deputy Clerk.

[Endorsed]: No. 10605. United States Circuit Court of Appeals for the Ninth Circuit. Mitsuye Endo, Appellant, vs. Milton Eisenhower, Director of War Relocation Authority and Wartime Civilian Control Administration, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed November 5, 1943.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1944

No. 70

MITSUYE ENDO

vs.

MILTON EISENHOWER, Directors, etc.

ORDER TO CERTIFY ENTIRE RECORD—May 8, 1944

In accordance with section 239 of the Judicial Code (28 U. S. C., section 346), it is ordered that the entire record in this case be certified up to this Court so that the whole matter in controversy may be considered by the Court. The case is assigned for argument immediately following the hearing of No. 679.

(3221)

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1944

No. 70

In the Matter of the Application of
MITSUYE ENDO
for a Writ of Habeas Corpus.

MITSUYE ENDO,

Appellant,

VS.

MILTON EISENHOWER, Director of War Re-
location Authority and Wartime Civilian
Control Administration, et al.,

Appellees.

OPENING BRIEF FOR APPELLANT.

WAYNE M. COLLINS,

Mills Tower, San Francisco 4, California,

Attorney for Appellant.

JAMES C. PURCELL,

WILLIAM E. FERRITER,

Mills Tower, San Francisco 4, California,

Of Counsel:

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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1944

No. 70

In the Matter of the Application of
MITSUYE ENDO
for a Writ of Habeas Corpus.

MITSUYE ENDO,

Appellant,

VS.

MILTON EISENHOWER, Director of War Re-
location Authority and Wartime Civilian
Control Administration, et al.,

Appellees.

OPENING BRIEF FOR APPELLANT.

JURISDICTION.

This is an appeal from a judgment denying appellant's petition for a writ of habeas corpus (R. 2-10.) made by the District Court for the Northern District of California and entered July 2, 1943. (R. 15-16.)

The Federal District Court had jurisdiction of the cause under 28 U.S.C.A., Section 451.

The Circuit Court of Appeals had jurisdiction of the appeal under 28 U.S.C.A., Sections 225 and 463.

This case now comes before the Supreme Court of the United States upon a certificate to the Supreme Court of questions of law, upon which the Circuit Court of Appeals desires instructions for the proper disposition of the cause.

The Supreme Court should bear in mind during its consideration of the case the pertinent statute reading as follows:

*"Summary hearing; disposition of party.—*The Court or justice or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments and thereupon to dispose of the party as law and justice require."

Fed. Code Ann., Title 28, Sec. 461.

As was pointed out by the Supreme Court in *Storti v. Massachusetts*, 183 U. S. 138, 46 L. ed. 120,

"that mandate is applicable to this court whether it is exercising its original or appellate jurisdiction.—Proceedings in habeas corpus are to be disposed of in a summary way * * * The command of the section is 'to dispose of the party as law and justice require'. All the freedom of equity procedure is thus prescribed and substantial justice promptly administered is ever the rule in habeas corpus."

This Court has also held: "The validity of a detention questioned by petition for a writ of habeas corpus

is to be determined by the condition existing at the time of the final decision thereon.

See:

Mensevich v. Tod, 264 U. S. 134, 136.

QUESTION INVOLVED

The issue before the Court is well stated by appellees to be "whether it is valid to confine persons who are not suspected of crime or of any culpable conduct or characteristics or of any proclivity or intention to harm the United States, on the ground that their release might for other reasons occasion situations which would adversely affect the prosecution of the war". (Appellees' Brief in Circuit Court, p. 32.)

STATEMENT OF CASE

Mitsuye Endo, the appellant, was born about twenty-four (24) years ago in the State of California and derives citizenship from her birth in the United States, subject to the jurisdiction thereof.

See:

U. S. Constitution—14th Amendment, Sec. 1;

U. S. v. Wong Kim Ark, 169 U. S. 649;

Soo-Hoo Yee v. U. S., 3 Federal (2d) 392;

Regan v. King, 134 Federal (2d) 413.

On December 7, 1941, when Pearl Harbor was attacked, Miss Endo resided in Sacramento, California, where she was employed by the State of California as a permanent Civil Service employee.

Following this attack on Pearl Harbor, and the declaration that a state of war existed, President Roosevelt issued a series of proclamations.

Proclamations 2526-2527-2528, issued December 8, 1941, respectively enjoined German, Italian and Japanese aliens to preserve the peace and to comply with regulations to be promulgated.

These proclamations were issued by the President under the authority vested in him by the Alien Enemy Act, 50 U.S.C.A. 21. (HR 2124, 77th Congress, 2nd Session, May 1942, pages 294-300.)

The President gave to the Attorney General power to set up zones, and establish restrictions therein upon the activities of alien enemies. (HR 2124, pages 302-314.)

Executive Order 9066 (see Appendix A) was issued by the President February 19, 1942, authorizing military commanders to prescribe military areas from which any or all persons might be excluded and with respect to which said military commander might impose in his discretion restrictions on any persons entering, leaving or remaining therein.

This Executive Order 9066 also authorized the Secretary of War to make provisions for transportation, feeding and sheltering residents excluded from such areas.

In issuing Executive Order 9066, the President purported to be acting to provide for protection against espionage and sabotage to national defense material, premises and utilities.

Executive Order 9102 (see Appendix B), issued March 21, 1942, established the War Relocation Authority and was issued to provide for the removal from restricted areas of persons whose removal was necessary in the interest of national security, and to provide for their subsequent relocation maintenance and supervision.

The same day, Public Law 503 (see Appendix C) became effective, making it a misdemeanor to do anything in a military area contrary to the restrictions applicable to the military area or contrary to the order of the military commander. (This specifically included entering, remaining in, or leaving the military area.)

Prior to the passing of this law, no intimation had been given, so far as is known, that the mass transportation of American citizens to concentration camps was contemplated.

Starting on March 27, 1942, General De Witt promulgated a series of Public Proclamations restricting the rights of American citizens of Japanese ancestry, to be abroad at certain times, to possess certain articles of personal property such as binoculars, cameras, radio short wave sets, and finally as a result of one of this series of proclamations of General DeWitt, Miss Endo was required to report with certain limited personal effects to a barbed wire stockade, guarded by armed soldiers, euphemistically termed a Civilian Assembly Center, where she was confined under armed guard some 10 or 15 miles from Sacramento, California, her home.

(See Appendix D for copy of Public Proclamation No. 8, dated June 27, 1942.)

Still later she was shipped—under guard—to a concentration camp known as Tule Lake War Relocation Center, near the Oregon border in Modoc County, California.

Still later, Miss Endo was banished from California entirely to another concentration camp located in Topaz, Utah, where she is presently confined, still under armed guard.

On February 19, 1943, Mitsuye Endo, the appellant herein, filed in the Southern Division of the District Court of the United States for the Northern District of California, her petition for a writ of habeas corpus (Tr. pp. 2-7), alleging that she was born May 10, 1920, at Sacramento, California; that she was at the time of her birth, and ever since has been, subject to the jurisdiction of the United States of America, and of no other country, and that she has been and now is a loyal citizen of the United States of America and owes allegiance to no other country, and is a citizen of no country.

It is further alleged that her brother is a soldier, serving in the Military Forces of the United States.

The petition proceeds to allege that appellant is confined at a concentration camp located at Newell, Modoc County, California, and within the jurisdiction of the District Court, and that she is confined in said concentration camp under armed guard, and that she is detained there against her will.

The petition alleges, on information and belief, that appellant is confined, detained and imprisoned in said concentration camp by Milton Eisenhower, Director of the War Relocation Authority and the Director of the War-Time Civilian Control Administration, and that said confinement and said imprisonment are maintained in accordance with the orders of J. L. DeWitt, Lieutenant General of the United States Army, commanding Military Area Number One, and Colonel Carl R. Bendetsen, Assistant Chief of Staff, Southwestern Defense Command of the Fourth Army, and certain subordinate officials of the War Relocation Authority in charge of the said concentration camp.

The petition further alleges that the sole reason for the detention of appellant is that she is an American citizen of Japanese ancestry, and that she has been imprisoned without any process or color of law whatsoever; that none such is pretended by those detaining her; that your petitioner alleges that no warrant or process of any court, magistrate, or any person having legal authority to issue the same exists to justify said arrest and imprisonment, but, to the contrary, the imprisonment, as above stated, has been without color of law and in violation of the Constitution and Laws of the United States of America, of which she is a citizen; that no charge has ever been made against said petitioner; that petitioner has never been informed of any other reason for which she is being held; that no hearing has ever been granted to said petitioner; that said petitioner is not, and never has been, a member of the

Military Forces of the United States, and is not subject to Military Law; (1) that Martial Law has not been declared; (2) that all the courts in and of the State of California are open and sitting and available to any party charging petitioner with crime or wrongdoing."

It is further alleged that in October, 1941, petitioner became a probationary Civil Service employee of the State of California; that thereafter, for a period of six months during said probationary period, the officials of the State of California investigated petitioner's qualifications for her position as a Civil Service employee and investigated her efficiency and honesty and moral responsibility, and certified her as a permanent Civil Service employee of the State of California; and that on or about April 7, 1942, the Personnel Board of the State of California suspended petitioner from her position as a State employee for the reason that she was subject to being evacuated and would be unable to perform the duties of her position.

The District Court issued no writ or other process to the appellee, or to any of the other persons alleged in the position as responsible for appellant's detention.

The Court did not even issue an order to show cause why a writ of habeas corpus should not issue.

However (this is not shown by the *Transcript* and is not a part of the *Record*), the District Court heard arguments by counsel for the petitioner and the Government, and permitted the filing of briefs by counsel

for petitioner, by the United States attorney, by the Attorney General of the State of California as *Amicus Curiae* in opposition to the issuance of the Writ, and by counsel for the American Civil Liberties Union in support of its issuance.

Thereafter, and on July 2, 1943, the Judge of the District Court who heard the matter made the following order:

"In the above-entitled cause, it appearing upon the face of the petition that petitioner is not entitled to a Writ of Habeas Corpus; and

It further appearing that she has not exhausted her administrative remedies under the provisions of Executive Order No. 9,102 (7 Fed. Reg. 2165) and the regulations promulgated thereunder;

It is therefore ordered that the petition for a Writ of Habeas Corpus be, and the same is hereby denied." (Tr. p. 15.)

During the course of her incarceration, after her petition for writ of habeas corpus was filed in the District Court on February 19, 1943, Miss Endo made an application for leave clearance.

Thereafter under the date of October 16, 1943, a conditional leave clearance was granted by the director. (See Appendix E.)

N.B. 1. For copy of Notice of Action on application for leave clearance see Appendix F.

2. For copy of application for indefinite leave see Appendix G.

3. For excerpts from regulations governing issuance of leave for departure from a relocation area—see Appendix H.

**THE PRESIDENTIAL PROCLAMATIONS ARE AN ASSUMPTION
OF DESPOTIC POWERS BY THE EXECUTIVE.**

Few public acts of such importance and so vitally affecting every citizen and resident of the United States, have ever been so generally misunderstood as the proclamations of President Roosevelt, conferring upon his military commanders the power of evacuation and detention of persons within their respective military zones.

It has been generally thought that the proclamations applied solely to the states bordering upon or adjacent to the Pacific Ocean and related to persons of Japanese ancestry alone.

On the contrary, they affect every foot of American soil and every person, or citizen or alien.

As was stated by counsel at the argument in the Court below, the presidential proclamations could be invoked as authority for the removal from California and the imprisonment in a concentration camp of the attorney who presented the petition in this cause and the federal judge who allowed him to be heard.

Any American citizen of Japanese ancestry who gives aid or comfort to the enemies of the United States can be indicted and put upon trial for treason, and, if found guilty, can be adjudged to suffer the

death penalty. The *Stefan* and the *Haupt* cases furnish sufficient evidence that the Federal Courts are not remiss in their duty, and, in cases of treason or espionage, have not erred on the side of clemency. The preservation of the liberty of a citizen and the maintenance of constitutional rights, even in time of war, are just as important as the defeat of the enemy; otherwise, to use the eloquent words of Mr. Justice Davis in *Ex parte Milligan, supra*:

"It could well be said that a country preserved at the sacrifice of all of the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so."

The sole basis, the only alleged legal justification for the presidential proclamations, is found in the so-called *Alien Enemy Act*, approved July 6, 1798; yet, startling as it may seem, the proclamations do not apply solely to alien enemies, or other aliens. Under the all-devouring provisions of the first proclamation, the Secretary of War or any designated military commander, may prescribe areas, "from which *any* or *all persons* may be excluded". (*Executive Order No. 9066*.)

The second proclamation (Exec. Order 9102) authorizes the War Relocation Authority to accomplish the evacuation of any person excluded by the military commander, provide for the relocation of such persons in appropriate places, provide for their needs in such manner as may be appropriate, and supervise their activities. To state the matter otherwise, the commanding general and the War Relocation Authorities

are given unlimited license and discretion to remove any person, whether white or black or yellow, whether citizen or alien—even the most loyal and patriotic American, from the locality where he may have had his home for years, where he may have built up a flourishing and lucrative business, where he may be engaged in the practice of law or medicine, or some other useful and honorable profession, *and transfer him to a concentration camp which, however comfortable and however humanely conducted, is, nevertheless, a place of imprisonment, because he cannot leave it without the consent of the director of the War Relocation Authority.*

It is apparent at first blush that the President in these executive orders, has applied to citizens of the United States restraints that can only be constitutionally and lawfully applied to alien enemies.

No such despotic power has ever been claimed by the President of the United States.

If, under the pretext of a war emergency, he may deprive a citizen of his liberty, he may likewise deprive him of his life. To hold that the Executive possesses such a power would be a monstrous doctrine; yet, it is the very power that the President has assumed and has attempted to delegate to his military commanders.

THE MEANING OF THE PHRASE "DUE PROCESS OF LAW" IS THAT THE LAW HEARS BEFORE IT CONDEMNS AND THAT NO PERSON CAN BE DEPRIVED OF A RIGHT WITHOUT A HEARING OR AN OPPORTUNITY TO BE HEARD, OR BE IMPRISONED WITHOUT A TRIAL.

It should not be, but apparently it is, necessary to state that the phrase "due process of law" apparently used for the first time in the reign of Henry III, is synonymous with the provision of the Magna Charta, that "no freeman shall be disseised, or imprisoned, or put to death; we will not set upon him, neither will we go forth against him, *nisi per legale iudicium parium suorum vel per legem terrae*" (save by the lawful judgment of his peers and the law of the land). By the "law of the land", is most clearly intended the general law, "a law which hears before it condemns, which proceeds upon inquiry (and which renders judgment only after trial."

Mott v. Georgia State Board of Examiners, 148 Ga. 55, 95 S. E. 867;

Argument of Daniel Webster in the Dartmouth College Case, 4 Wheat. 518, 4 L. Ed. 629.

The essential elements of due process of law are notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause.

Ex parte Wall, 107 U. S. 265, 27 L. Ed. 552, 27 L. Ed. 569;

12 Am. Jur. 267, and cases cited in footnote.

In *Pierce v. Superior Court*, 4 Cal. (2d) 759, 37 Pac. (2d) 453, it was held that the Court had no jurisdiction to enter a decree cancelling alleged fraudulent

registration of voters who had not been regularly served with summons and had not personally appeared in the action.

In the earlier case of *McClatchy v. Superior Court*, 119 Cal. 413, 51 Pac. 696, the Court holds that in order to constitute due process of law the party proceeded against must not only have notice, but must be accorded the right to make a defense and to produce evidence in his own behalf. The Court quotes with approval from *Hovey v. Elliott*, 167 U. S. 409, 42 L. Ed. 215, as follows:

"Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, could it be pretended that such an enactment would not be violative of the constitution? If this is true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under the express legislative sanction would be violative of the constitution?"

If such power obtains, then the judicial department of the government, sitting to uphold and enforce the constitution, is the only one possessing a power to disregard it. If such authority exists, then, in consequence of their establishment to compel obedience to law and enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent."

The Court also quotes from *Galpin v. Page*, 18 Wall. 350:

"It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is administered."

If the judicial branch of the government may not deprive any person of his liberty without a trial; if the legislative branch of the government cannot constitutionally pass a law providing for imprisonment without a trial, how can the executive branch of the government provide for the arrest, removal and detention of citizens who have not only not been tried for any crime, but who have not even been charged?

Innumerable cases might be cited to the effect that Congress cannot delegate to the President the power to make rules and regulations, the violation of which is punishable as a crime, without laying down a clear and specific standard which the executive must follow in the formulation of such rules. Thus, in the case of *Panama Refining Co. v. Ryan*, 293 U. S. 288, the Supreme Court, holding unconstitutional certain provisions of the so-called National Recovery Act, says:

"If the codes have standing as penal statutes, this must be due to the effect of the executive action. But Congress cannot delegate legislative

power to the President to exercise unfettered discretion to make whatever laws he thinks may be needed or advisable."

Later in the same opinion it is said that Congress may not delegate to the President "*the power to roam at will*".

Powers which Congress may not delegate to the President may certainly not be assumed by the President himself. It seems absurd that one hundred and fifty-six years after the adoption of the Constitution, and in the light of the innumerable decisions of the Supreme Court of the United States, of the subordinate Federal Courts, and the courts of last resort of the several states, it should be necessary to argue that no citizen of this country, even in time of war, and even if he be suspected of crime against, or disloyalty to the United States, can be taken from his home and business and restrained of his liberty without a trial, save in cases of actual insurrection or invasion, when the civil authorities are no longer able to perform their functions and the civil courts are unable to execute their process.

THE IMPRISONMENT AND DETENTION OF APPELLANT IS ILLEGAL UNDER THE RULES STATED IN EX PARTE MILLIGAN, WHICH HAS NEVER BEEN OVERRULED, AND WHICH HAS BEEN REPEATEDLY APPROVED.

Every lawyer of even ordinary learning is familiar with the *Milligan* case, supra. During the Civil War

great bitterness was aroused against citizens of the northern states, who had expressed opposition to the conduct of the war, or who were suspected of sympathy with the Confederate States. Even the great Lincoln was induced by some of his advisers to take various illegal and unconstitutional measures against persons who resided in states where there was neither insurrection nor invasion. Almost without exception, the Courts, both State and Federal, held the arrest and imprisonment of such persons by the military authorities unconstitutional and in excess of the powers of the executive. The first of these cases worthy of note is *Ex parte Merryman*, Taney 246, 17 Fed. Cas. 14, No. 9487. There the petitioner was arrested by the order of a military commander and imprisoned in Fort McHenry, Virginia. Chief Justice Taney, sitting in the Circuit Court, issued a writ of habeas corpus which the commander of the fort refused to obey. In the course of the opinion the Chief Justice says:

"As the case comes before me, therefore, I understand that the president not only claims the right to suspend the writ of habeas corpus himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him. No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the president claimed this power, and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise; for I had supposed it to be one of those

points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands, *that the privilege of the writ could not be suspended, except by act of congress.*"

Discussing the nature of the presidential office and its powers, the opinion further proceeds:

"He is not empowered to arrest any one charged with an offense against the United States, and whom he may, from the evidence before him, believe to be guilty; nor can he authorize any officer, civil or military, to exercise this power, for the fifth article of the amendments to the constitution expressly provides that no person shall be deprived of life, liberty or property, without due process of law—that is, judicial process."

Even if the privilege of the writ of habeas corpus were suspended by act of congress, and a party not subject to the rules and articles of war were afterwards arrested and imprisoned by regular judicial process, *he could not be detained in prison, or brought to trial before a military tribunal, for the article in the amendments to the constitution immediately following the one above referred to (that is, the sixth article) provides, that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."*

After a discussion of the nature of the writ of habeas corpus, and declaring that it may not be suspended by the President, Chief Justice Taney proceeds:

"If the president of the United States may suspend the writ, then the constitution of the United States has conferred upon him *more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the crown*; a power which the queen of England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign even in the reign of Charles the First."

He then proceeds to quote from two of his illustrious predecessors:

"Mr. Justice Story, speaking, in his Commentaries, of the habeas corpus clause in the constitution, says: 'It is obvious that cases of a peculiar emergency may arise, which may justify, nay, even require, the temporary suspension of any right to the writ. But as it has frequently happened in foreign countries, and even in England, that the writ has, upon various pretexts and occasions, been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design, and sometimes because they were forgotten, *the right to suspend it is expressly confined to cases of rebellion or invasion, where the public safety may require it.*' A very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused, in bad times, to the worst of purposes. Hitherto, no suspension of the writ has ever been authorized by congress,

since the establishment of the constitution. It would seem, as the power is given to congress to suspend the writ of habeas corpus, in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body. 3 Story, Comm. Const. §1336.

And Chief Justice Marshall, in delivering the opinion of the supreme court in the case of *Ex parte Bollman and Swartout*, uses this decisive language, in 4 Cranch (8 U. S.) 95: "It may be worthy of remark, that this act (speaking of the one under which I am proceeding) was passed by the first congress of the United States, sitting under a constitution which had declared "that the privilege of the writ of habeas corpus should not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it". Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means, by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of habeas corpus. And again on page 101: "If at any time, the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide; until the legislative will be expressed, this court can only see its duty, and must obey the laws." I can add nothing to these clear and emphatic words of my great predecessor."

The opinion concludes with words which apply with the fullest force to the case at bar:

“The constitution provides, as I have before said, that ‘no person shall be deprived of life, liberty or property, without due process of law.’ It declares that ‘the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.’ It provides that the party accused shall be entitled to a speedy trial in a court of justice.

“These great and fundamental laws, which Congress itself could not suspend, have been disregarded and suspended, like the writ of habeas corpus, by military order, supported by force of arms. Such is the case now before me, and I can only say that *if the authority which the constitution has confided to the judiciary department and judicial offices, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.*”

In view of the fact that the United States Marshal for the District of Maryland was unable to execute the attachment for contempt issued against the Commander of Fort McHenry for disobedience to the writ of habeas corpus, the Chief Justice directed

that the record, together with his opinion, be transmitted to the President of the United States, to the end that he might exercise his constitutional duty to take care that the laws of the United States were faithfully enforced.

Judges of the state courts took the same position in regard to the arrest and imprisonment of civilians as Chief Justice Taney, and two of these opinions are outstanding. *Griffin v. Wilcox*, 21 Ind. 370, was an action brought against a Captain in the Federal Army, who was a Deputy Provost Marshal, for the false imprisonment of the plaintiff pursuant to an order issued by his superior officer, prohibiting the sale of liquor to enlisted men. The lower court held that the order issued by his superior officer was a justification for the imprisonment and was a bar to the suit for damages. Reversing the judgment of the lower Court, the Supreme Court of Indiana says (at p. 375):

"Griffin was not arrested and imprisoned under the civil law of this State, nor of the United States, for he had violated no such law. There is no act of Congress, nor of the State Legislature, prohibiting the sale of liquor to an enlisted soldier. The only law in this State, containing such prohibition, when Griffin made his sale to a soldier, was that enacted by the military order of Major Lyon. Griffin was arrested, then, by military authority. Could he be legally arrested, for the cause alleged for his arrest, by that authority, in the place, and at the time it was so made?

Griffin was not connected with the military or public service, was not a spy from the enemy, and was not within military lines. *He was a citizen of*

the State, pursuing, lawfully, his lawful vocation, in the civil walks of life. Had he been a soldier, in the service, he would have been subject to the well defined code of military law, which requires obedience by soldiers to the orders of their officers, and subjects them to punishment, by such officers, in prescribed modes, for disobedience to these orders. In this case, had Major Lyon addressed his order to the soldiers subject to his command, ~~forbidding~~ them to drink intoxicating liquor, or to leave the lines to go where it could be obtained, and the soldiers, subject to his jurisdiction, had disobeyed his order, he might, perhaps, though the point is not now before us for decision, have caused them to be punished by military law. Military men, in the service, are subject to the code of military law, enacted for their government, and to be enforced, in prescribed modes, by military officers. So, legislative bodies administer the *lex parlamentaria*—the law governing legislatures. It is a special law for such bodies. But, as a general proposition, *the citizen, in the civil walks of life, is not subject to military orders, nor to the lex parlamentaria, nor to punishment by military or parliamentary law. He is governed by the law of the land, administered in the Courts of Justice.*”

The opinion reviews the decisions and writings of learned authorities on military law, quoting the celebrated passage from *Coke*:

“When the courts of justice be open, and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, it is said to be time of peace. So

when by invasion, insurrection, rebellion or such like, the peaceable course of justice is disturbed and stopped, so as the courts be as it were shut up, *et silent inter leges armâ*, then it is said to be time of war."

An even more elaborate discussion of the right of military authorities to imprison and detain civilians in a district in which the civil courts are functioning and the civil authority unopposed is found in *In Re Kemp*, 16 Wis. 382. Each of the three justices of the Supreme Court of Wisconsin wrote a separate opinion which merits quotation in its entirety, but owing to the limitations placed upon the length of briefs by the Rules of this Court, we can do no more than summarize the conclusions reached as set forth in the *syllabus*:

"The power of suspending the writ of *habeas corpus* under the first section of art. IX. of the constitution of the United States, is a legislative power, and is vested in congress, and the president has no power to suspend the privilege of the writ of *habeas corpus* within the sense of that section of the constitution.

"The powers of the president as commander-in-chief of the army and navy in time of war are strictly constitutional powers, and are derived from the authority of congress to carry on war, and though not defined by the constitution, yet they are limited by the laws and usages of nations, adopted in their full extent by the common law.

"Martial law is restricted to and can exist only in those places which are the actual theatre of war and their immediate vicinity, and it cannot be

extended to remote districts, or those not immediately connected with the operations of the contending armies.

"If in time of civil war the civil authorities of a district are able by the ordinary process to preserve order and punish offenses and compel obedience to the laws, martial law does not exist there, and the military commander has no jurisdiction; but if, owing to the disloyalty of magistrates or the insurrectionary spirit of the people, the laws cannot be enforced and order maintained, then martial law takes the place of civil law in such district, wherever there is sufficient military force to execute it.

"The president has no power to prescribe offenses, or to make rules for the conduct of citizens in districts not subject to martial law, and enforce them by fines or other punishment by any form of trial whatever.

"A citizen not in the land or naval service, nor in the militia in the active service of the United States, who discourages volunteer enlistments or forcibly resists a militia draft, cannot be punished therefor by a court martial or military commission."

The full court reached the conclusion that the proclamation of President Lincoln dated September 24, 1862, suspending the privilege of the writ of habeas corpus was not a legal and valid exercise of executive power under the Constitution, and was void. During the course of the Civil War, there were many other flagrant invasions of constitutional rights, including the suppression of newspapers opposed to the adminis-

tration. One of these had a tragic aspect. After the assassination of President Lincoln and the death of his actual assassin, seven persons accused of complicity in the crime were brought to trial before a military commission, sitting in the District of Columbia, where the civil courts were open and had been functioning without interruption during the entire period of the conflict. Four of these, including a woman, were sentenced to be hanged. The District Judge of the District of Columbia issued a writ of habeas corpus for Mrs. Surratt, which General Hancock, the Military Commander in the District, acting under the instructions of the President, refused to obey, and the sentence was carried out.

Two of the other alleged conspirators were ably defended by General Ewing, a brother-in-law of General Sherman who was a brave officer and a skillful lawyer, and who challenged the jurisdiction of the commission with the words: "Gentlemen, you are no better than Judge Lynch". It may be stated, in passing, that practically all historians agree that Mrs. Surratt was innocent. This was even conceded—in fact, vociferously declared by General Butler—who, as counsel for the Government in the *Milligan* case, went to the extreme in defending military commissions, but who, on the floor of the House of Representatives, directly charged Bingham, the Judge Advocate at the trial, with having procured the execution of an innocent woman. (See: *DeWitt's Assassination of Lincoln*.)

In the following year, *Ex Parte Milligan* was decided. The history of the case and the decision of the

Court are familiar to everyone who has even a smattering of constitutional law. No Court, even in these days, has had the temerity to overrule its authority, and any attempt to distinguish it is futile.

The highest Court in the land there settled once and for all, the proposition that a military commission has no jurisdiction to try and sentence one not a resident of an enemy state, nor a prisoner of war, but a citizen who was never in the military or naval service, in a state where federal authority was always unopposed, and its Courts always open to hear criminal accusations and redress grievances, and that no usage of war could sanction a military trial for any offense whatsoever of a citizen in civil life in nowise connected with the military service. Congress, the Court holds, could grant no such power. The following language of Mr. Justice Davis, has been so often quoted, that it has become classic:

"No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birth-right of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is, alone through the means which the laws have provided for that purpose, and if they are ineffectual there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection and they are at the mercy of wicked rulers; or the clamor of an ex-

cited people. If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle; and secured in a written Constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it, this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct to leave room for misconstruction or doubt of their true meaning. Those applicable to this case are found in that clause of the original Constitution which says that the trial of all crimes, except in case of impeachment, shall be by jury: and in the fourth, fifth and sixth articles of the amendments. The fourth proclaims the right to be secure in person and effects against unreasonable search and seizure; and directs that a judicial warrant shall not issue without proof of probable cause supported by oath or affirmation. The fifth declares that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor be deprived of life, liberty, or property, without due process of law. And the sixth guarantees the right of trial by

jury, in such manner and with such regulations that with upright judges, impartial juries and an able bar, the innocent will be saved and the guilty punished. It is in these words: 'In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.' These securities for personal liberty thus embodied were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.

Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper, and that the

principles of constitutional liberty would be in peril, unless established by irreparable law. The history of the world had taught them that what was done in the past might be attempted in the future. **The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority.**

“Have any of the rights guaranteed by the Constitution been violated in the case of Milligan? And if so, what are they?”

“Every trial involves the exercise of judicial power; and from what source did the Military Commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish, and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President; because he is controlled by law, and has his ap-

appropriate sphere of duty, which is to execute, not to make, the laws; and there is no unwritten criminal code to which resort can be had as a source of jurisdiction."

Since the military authorities have no jurisdiction by virtue of a Presidential proclamation to *try* a civilian for an alleged offense in a district where the civil Courts are open, **how much less right have they to imprison a citizen without any trial at all, when he is neither charged with, nor suspected of, any crime, and when his loyalty (as in this case), is not called into question?**

THE EXISTENCE OF A STATE OF WAR DOES NOT SUSPEND CONSTITUTIONAL RIGHTS.

Ever since the decision in the *Milligan* case, the Courts have uniformly held that the existence of a state of war does not authorize the federal government to take private property without compensation, or to violate the due process of law clause contained in the fifth and fourteenth amendments. Thus, in *U. S. v. Cohen Grocery Co.*, 225 U. S. 81, 65 L. Ed. 516, Chief Justice White states the principle in the following language:

"We are of the opinion that the court below was clearly right in ruling that the decisions in this court indisputably establish the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guarantees and limitations of the fifth and sixth amendments as to questions such

as we are here passing upon. (Citing cases.) *It follows that in testing the operation of the Constitution upon the subject here involved, the question of the existence or non-existence of a state of war becomes negligible, and we put it out of view.*"

In *Schechter v. U. S.*, 95 U. S. 495, 79 L. Ed. 1570, Chief Justice Hughes says:

"Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be, **both in war and in peace, but these powers of the national government are limited by the constitutional grants.** Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary."

These are comparatively recent utterances by the highest court in the land, and they reiterate the doctrine of the *Milligan* case. Earlier decisions, both before and after *Ex parte Milligan*, are to the same effect. Thus, in *In re Egan*, 8 Fed. Cas. No. 4304, the petitioner was tried before a military commission in South Carolina in November, 1865, for a murder committed in September of the same year, and was convicted and sentenced to imprisonment for life in the penitentiary in Albany, New York. Hostilities had terminated and the Confederate Armies had surrendered some seven months before the trial. The petitioner was discharged on habeas corpus by Justice Nelson of the Supreme Court of the United States.

sitting on Circuit. The Justice does not refer to the *Milligan* case, but he reaches the same conclusion as to the jurisdiction of the military authorities:

"I think that the record fails to show any power on the part of the military officer over the alleged crime therein stated, or any jurisdiction of the military commission appointed by him to try the accused. No necessity for the exercise of this anomalous power is shown. For aught that appears, the civil courts of the State of South Carolina were in the full exercise of their judicial functions at the time of the trial as restored by the suppression of the rebellion some seven months previously, and by the revival of the laws and the reorganization of the state government, in obedience to, and in conformity with its constitutional duties to the federal union."

In the earlier case of *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75, the plaintiff, who was a trader during the war between the United States and Mexico, went into the adjoining provinces, which were in the possession of the military authorities of the United States, for the purpose of carrying on trade with the inhabitants, which was sanctioned by the executive branch of the government, and also by the Commanding Military Officer. His property was seized by the Commanding Officer upon the ground that he was trading with the enemy. Plaintiff subsequently brought an action of trespass against the officer in the Circuit Court of the United States for the Southern District of New York, and a verdict for the plaintiff was affirmed by the Supreme Court of the United

States, Chief Justice Taney using the following language:

"There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with particular duty, may impress private property into the public service or take it for public use. Unquestionably in such cases the government is bound to make full compensation to the owner; but the officer is not a trespasser. But we are clearly of the opinion that in all of these cases **the danger must be immediate and impending; or the necessity urgent for the public service such as will not admit of delay, and where the action of the civil authorities would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this particular power may be lawfully exercised. It is the emergency that gives the right, and the emergency must be shown to exist, before the taking can be justified.**"

Indeed, even in the case of alien enemies, the Courts have shown a disposition to accord to them, as long as they reside peaceably in this country, and give no aid or comfort to the enemy, the same rights that our own citizens possess, such as access to our Courts, save in cases where the litigation would, for some reason or other, interfere with the prosecution of the war. This is particularly true where the party involved, though a subject of the enemy country, has

resided within our territory for a long period of time, has been engaged in business in this country, has acquired a domicile here, and has acquired the status of a friendly alien. Thus, in *Ex Parte Kawato*, 316 U. S. 650, 63 S. Ct. 115, it is held as follows:

(1) That the words 'enemy alien' as applied to a native of Japan who had become a resident of the United States three years before the outbreak of the war, with Japan and who, at the outbreak of the war, was libellant in a proceeding in admiralty pending in the District Court, are merely a legal definition of his status because he was born in Japan, with which we are at war;

(2) That the early English Common Law rule barring all aliens from the courts has been relaxed to such an extent that alien enemies residing in England may maintain an action;

(3) That a resident alien enemy is free to use the Courts, except in so far as such use would accomplish a purpose which might hamper our own war efforts or give aid to the enemy.

(4) That the Trading With the Enemy Act was never intended, without presidential proclamation, to effect resident aliens."

The executive orders of President Roosevelt, the constitutionality of which is assailed, are not limited to alien enemies, or persons whose ancestors were citizens of any nation with which we are now at war. The drastic powers conferred upon the military commander *may be exercised against any person* within the military area without regard to race, color, ancestry or citizenship. No such despotic and tyrannical

power has ever been exercised nor has its exercise ever been attempted in this country.

To find a parallel in modern times we are bound to look in the concentration camps of Germany and Russia, into which are heeded all those who are *persona non grata* to Hitler or Stalin.

For years the American press and screen politicians and statesmen, have condemned these practices by foreign dictators. If we permit the President of the United States and his subordinate officers to remove loyal American citizens from their residences, compelling them to give up their business and surrender (as in the case of this petitioner) their means of livelihood, and imprison them without trial, we are but following the example of the Madman of Berchtesgaden while heaping abuse upon him for setting the example.

THE PRESIDENTIAL PROCLAMATIONS AND THE EXCLUSION ORDERS OF GENERAL DE WITT AMOUNT TO A QUALIFIED AND LIMITED DECLARATION OF MARTIAL LAW WHICH CAN NEVER LAWFULLY EXIST, SAVE IN ENEMY TERRITORY, OR IN A ZONE OF ACTUAL MILITARY OPERATIONS, WHERE THE CIVIL COURTS CANNOT FUNCTION.

Following the doctrine of the *Milligan* case, it has been held by the Federal Courts that martial law and the civil law cannot exist together because the former is wholly repugnant to the latter. It has been well said that martial law is in the strict sense not law at all, but rather a cessation of all municipal law as

an incident of the *jus belli* and because of paramount necessity.

Constantin v. Smith, 57 Fed. (2d) 227.

In *Wheat. on International Law* (3rd Ed.) page 740, quoting *In re Ezeta*, 62 Fed. 972, it is said:

"It is the will of the commander of the force. In the proper sense it is not law at all."

The Duke of Wellington in one of his dispatches from Portugal in 1810, in speaking of martial law, stated that as applied to persons other than officers and soldiers in the Army, it is neither more nor less than the will of the general of the Army, and that he punishes either with or without trial, for crimes either declared to be so, are not so declared by any existing law, or by his own orders. The Duke, who was then fighting on foreign soil, and who was occupying enemy territory, added:

"I could have established any law that I saw fit, and I established the law of my country."

Subsequently, in a speech in the House of Lords, he stated:

"In fact, *martial law means no law at all*. Therefore the general who declares martial law and commands that it shall be carried into execution is bound to lay down distinctly the rules and regulations according to which his will is to be carried out."

Hansard's Parliamentary Debates, Vol. XCV, p. 80.

In the case of *In re Egan*, supra, it is stated:

"All respectable writers and publicists agree in the definition of martial law—that it is neither more nor less than the will of the general who commands the army. It overrides and suppresses all existing civil laws, civil officers and civil authorities, by the arbitrary exercise of military power; and every citizen or subject, in other words, the entire population of the country, within the confines of its power, is subject to the mere will or caprice of the commander. **He holds the lives, liberty and property of all in the palm of his hand.** Martial law is regulated by no known or established system or code of laws, as it is over and above all of them. **The commander is the legislator, judge and executioner.** His order to the provost-marshal is the beginning and the end of the trial and condemnation of the accused. There may be a hearing, or not, at his will. If permitted, it may be before a drum-head court martial, or the more formal board of a military commission, or both forms may be dispensed with, and the trial and condemnation be equally legal, though not equally humane and judicious."

In *Constantin v. Smith*, supra, the following language is used:

"As I read the authorities there is no occasion for martial law unless the Courts themselves have been so incapacitated by reason of the circumstances existing and calling forth a declaration of martial law that they are unable to function. The reason for martial law is the necessity to rehabilitate the Courts, not to destroy them or usurp their powers."

In *Ex parte Zimmerman*, 132 Fed. (2d) 442, in which the majority of the Court upheld the detention of the petitioner by the military authorities in Hawaii on the grounds that the islands had actually been invaded and bombarded, and that conditions were such as to warrant martial law, Judge Haney, in a dissenting opinion, reviews the history of martial law, showing that it was never countenanced or tolerated in England, and that the framers of the Constitution, fearful of the powers granted to the Federal Government, carefully provided that the privilege of the Writ of *Habeas Corpus* should not be suspended unless, when in cases of rebellion or invasion, the public safety may require it. The learned Judge sums up the entire law on the subject in two sentences,

"If the situation is such that the civil government cannot function, the Army rules until such government can be restored. Once the situation returns to normalcy to the extent that civil government can function, military rule or government vanishes and ceases to exist."

APPELLEES' FEAR THAT RELEASE OF A LOYAL CITIZEN OF THE UNITED STATES MAY INCUR THE DISPLEASURE OF OTHER CITIZENS OR RESIDENTS DOES NOT AUTHORIZE THE IMPRISONMENT, NOW OF ABOUT TWO YEARS DURATION.

It is admitted by appellees that the War Relocation Authority has thoroughly investigated the petitioner and has "determined that in so far as her personal characteristics and loyalty are concerned, her release

would not be detrimental to the war program and to the public peace and security". (See Appellees' Brief, Circuit Court, p. 31.) Throughout these proceedings, from their inception, the loyalty and citizenship of appellant has been conceded. As a matter of fact, there is not a single allegation in the petition for a writ of habeas corpus that is challenged. No order to show cause was issued. It is, therefore, a case where the Government concedes

(1) That petitioner is a native-born citizen of the United States;

(2) That she is confined, imprisoned, and restrained of her liberty, by appellees by order of General De Witt, the military commander of the district at the time of her incarceration, and by virtue of no other process or authority and for no other reason, except that she is a person of Japanese ancestry;

(3) That she is charged with no crime;

(4) That martial law has not been declared in the district wherein petitioner resides;

(5) That petitioner is not a member of the military forces of the United States;

(6) That all Courts, State and Federal were open and sitting and were hearing and determining all causes, civil and criminal;

(7) That petitioner has a brother serving in the armed forces of the United States.

THE CIRCUIT COURT OF APPEALS HAS POWER TO AND SHOULD ISSUE A WRIT OF HABEAS CORPUS IN THE CASE AT BAR.

The issue before the Court is well stated by appellees to be "whether it is valid to confine persons who are not suspected of crime or of any culpable conduct or characteristics or of any proclivity or intention to harm the United States, on the ground that their release might for other reasons occasion situations which would adversely affect the prosecution of the war". (Appellees' Brief, Circuit Court, p. 32.)

Although appellees used the plural "reasons", only one reason is advanced, and that comes under the title "Community Hostility to Unsupervised Relocation". Everything else is an interpretation of possibilities arising from possible community hostility.

By this they mean that communities may be suspicious or hostile toward citizens of Japanese ancestry, as a result of which violence or disorder may occur, and that as a result of violence or disorder the successful prosecution of the war may be affected, because such violence or disorder may necessitate the use of troops to deal with it and because that may affect the fighting morale, and may if carried to an extreme degree interfere with war production, and may aid Japanese propaganda—on the theory that the present war is a racial one—and may bring about reprisals on United States citizens held in Japanese occupied territory.

(I suppose it will occur to the Court that if our recent publicity concerning Japanese savagery in the

treatment of American nationals is to be believed, the Japanese seek no excuse for such acts under the guise of reprisals.)

(The United States Supreme Court has heretofore dealt with the question of the abrogation of civil rights under the guise of necessity to prevent civil disorder. One noteworthy case is *Hague v. C. I. O.*, 307 U. S. 496, where the Court held that threatened disorder must be met by police protection instead of the, alleged, more efficient method of refusals and permits which interfered so seriously with the right of assembly.

The second outstanding case on this point is *Buchanan v. Warley*, 245 U. S. 60, 38 S. Ct. 16, where a Negro sought to enforce a contract for the purchase of real property and was denied specific performance because an Illinois statute prohibited any Negro from residing in any block inhabited chiefly by members of the white race.

The justification advanced for the constitutionality of this statute was the identical "community hostility" theory, coupled with the necessity for stifling racial strife and promoting public peace, advanced by the appellees as their justification for the constitutionality of detention of a girl the appellees admit is "not suspected of crime or of any culpable conduct or characteristics or of any proclivity or intention to harm the United States".

The Supreme Court reversed the lower Court in the *Buchanan* case, and said:

"It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."

The appellees also explore the possibility that Miss Endo may be in a sort of "protective custody". Experience in Europe shows that this custody is usually fatal. The nearest case by analogy is *Stoutenburgh v. Frazier*, 16 App. Dec. D. C. 229, where the Court considered an act of Congress permitting the confinement of a person as a subject of *suspicion* which could have been construed to authorize "preventive custody" *only after a hearing and conviction of being a suspicious person*. The Court held the act unconstitutional.

"Protective custody" of one who asks or seeks it, is not justification for holding one who does not want it. For instance, one confined as a drunkard, where the restraint originally was voluntary and then became involuntary finds an appropriate remedy in habeas corpus. See

Matter of Baker, 29 How. Pr. 485 (N. Y.).

THERE IS NO SPECIFIC AUTHORIZATION BY EITHER THE PRESIDENT OR CONGRESS FOR DETENTION OR IMPRISONMENT OF AN ADMITTEDLY LOYAL AMERICAN CITIZEN.

It is significant that appellees admit that nowhere is there a specific authorization to the commanding gen-

eral to detain Miss Endo or any other American citizen.

7 Congress has never specifically authorized it, no presidential order has specifically authorized detention, and there is not even an indication that where loyalty has been determined in a citizen, imprisonment should be her lot.

None of the acts taken by anyone prior to March 21, 1942, when Public Law No. 503 was adopted by Congress had intimated that detention of any loyal citizen was to take place.

Congress refused to pass an express authorization for taking all Japanese into custody. (88 Congressional Record, February 19, 1942, S. Rep. No. 1496.)

In the Fall of 1941, Attorney General Biddle spoke of the detention of aliens without trial and said:

"The Hobbes Bill introduced this year authorizes when and only as long as deportation is impossible detention of the alien in Federal institutions * * * This Bill is in a sense revolutionary because it permits detention without trial by jury. But when aliens cannot be deported some control is desirable. It is a very serious curb on civil rights made essential by the circumstances of war."

See 2 Bill of Rights Review 13.

Prior to that time, and necessitating this statute, our Courts had repeatedly held that the detention of an alien pending deportation for an unreasonable time, even because the country to which he was ordered

deported refused to accept him, could not be justified, and he must be liberated.

See

Bouder v. Johnson, 3 Fed. Rep. (2d) 238, and cases therein cited.

See, also: *Saksagansky v. Weedon*, 53 Fed. (2d) 13.

Thus the only Act of Congress authorizing internment relates solely to aliens. (40 Stat. 531 (1918), 50 U. S. C. Sec. 24 (1941).)

This is also pertinent when read in the light of the Supreme Court's decision, that statutory authorization to the President to seize aliens did not authorize a presidential order seizing alien property. (*Brown v. U. S.*, 8 Cranch 110.)

In the last World War, a statute was proposed in Congress which would have divided this country into military districts, subject to regulation by military commanders. President Wilson wrote thereof to Senator Overman:

"I am wholly and unalterably opposed to such legislation * * * I think it is not only unconstitutional but that in character, it would put us nearly upon the level of the very people we are fighting * * * It would be altogether inconsistent with the spirit and practice of America * * * I think it is unnecessary and uncalled for."

Volume 8, Baker, Woodrow Wilson Life and Letters, p. 100.

That which Wilson thought unconstitutional and unAmerican has now been done. It calls to mind the

words of former Chief Justice Hughes uttered in 1920, which a denial of a writ of habeas corpus to appellant would make prophetic. The former Chief Justice was speaking of the judicial assault upon the Bill of Rights arising out of the last war's hysteria. He said:

"We may well wonder in view of the precedence now established whether constitutional Government as heretofore maintained in this Republic could survive another great war, even victoriously waged."

See also

War & Law by Roscoe Pound, 14 Pa. Bar Assn. Quarterly #2-3, Jan.-Apr. 1943.

As far as Wilson's suggestion that such procedure would put us nearly upon the level of the very people we are fighting, Justice Murphy in his concurring opinion in *Hirabayashi v. U. S.*, 63 S. Ct. Rep. 1377, at 1390, 320 U. S. 81, said:

"Under the curfew order here challenged no less than 70,000 American citizens have been placed under a special ban and deprived of their liberty, because of their particular racial inheritance. *In this sense it bears a melancholy resemblance to the treatment accorded the members of the Jewish race in Germany and other parts in Europe.*"

The entire basis for curfew orders and evacuation and the present detention is found in Executive Order 9066, authorizing the Secretary of War to prescribe military areas, and Executive Order 9102 establishing the War Relocation Authority with the questionable

ratification of them by the Appropriation Acts of Congress or Public Law No. 503 or both.

Nowhere in any of these presidential orders or the Acts of Congress is there a specific, plainly worded authorization for detention of citizens, outside of the military areas.

A. THE PRESIDENTIAL ORDERS UNDER WHICH GENERAL DE WITT'S PROCLAMATIONS WERE ISSUED AND THE PROCLAMATIONS WERE PROFESSEDLY MEASURES TAKEN FOR PROTECTION WITHIN MILITARY AREA NO. 1 AGAINST "ESPIONAGE AND SABOTAGE" AND "IN THE INTERESTS OF NATIONAL SECURITY".

Executive Order 9066 is based upon the necessity for "protection against espionage and against sabotage".

Executive Order 9102 is to "provide for removal from designated areas of persons whose removal is necessary in the interest of National Security". This latter order specifically is directed to persons removed under authority of the prior order 9066.

Public Law 503 provides that whoever shall enter, remain in, leave, or commit any act in any military area, contrary to restrictions applicable to the area of the Secretary of War or the military commander, is guilty of a misdemeanor, provided he had knowledge of the restriction and intent to violate it.

It is equally significant that in the House and Senate discussion preliminary to the passage of Public Law 503, the emphasis at all times was on the necessity for removal of *certain individuals* from limited areas.

Representative Costello for the House Military Affairs Committee said the purpose of the Bill was "to remove certain aliens as well as others from areas in which war production is located and military activities are being conducted".

Senator Reynolds, Chairman of the Senate Military Affairs Committee, said,

"We are asked to provide the Department with authority to keep *certain individuals* from entering or leaving military zones * * *

See

88 Congressional Record, Part 2, pages 27,722-25; House of Representatives Reports No. 1906, and 77th Congressional (Second Session) 1942, 2 to 3;

Appellees concede,

"It is not entirely clear either that the authority has been granted by the Congress or the President to detain such persons as the appellant or that such detention is constitutional." (Appellees' Brief, Circuit Court, p. 32.)

It is clear that the basis of her detention is Executive Order No. 9066 and Executive Order No. 9102.

Reliance is placed upon the congressional acts cited by appellees only as ratification by Congress of those two orders.

The question therefore arises, how does Executive Order 9066 specifically based upon the necessity for "protection against espionage and against sabotage" and Executive Order 9102 which is "to provide for

removal from designated areas of persons whose removal is necessary in the interest of national defense" constitute authority for the detention of a citizen of the United States, who according to the appellees has no "proclivity or intention to harm the United States"? (See Appellees' Brief, Circuit Court, p. 32 for quotation.)

What has a loyal citizen to do with espionage or sabotage—how does her imprisonment aid national defense? Unless some reasonable, present and substantial connection is shown, her imprisonment is under orders which are not pertinent to her. It should be borne in mind that not even an order to show cause was issued and the allegations of her petition for the writ of habeas corpus stand unchallenged. To establish any pertinency of these statutes or orders to appellant resort must be had to judicial knowledge. Is this Court prepared to say that at the present time the release of appellant would facilitate espionage or sabotage or that her imprisonment is necessary in the interest of national defense? Or should the Government which holds her on the admitted charge of Japanese ancestry be put to proof to show the connection between the appellant and espionage, sabotage, and national defense?

In this connection also, it should be borne in mind that appellees concede that Public Proclamation No. 8 of General De Witt under which the appellant was removed to the War Relocation Center as a matter of military necessity was founded on the findings of Proclamation Nos. 1 and 2 of General De Witt, and

"was relying on the objective of protection against espionage and sabotage in connection with any attempted invasion as the justification for the detention regulation". (See Appellees' Brief, Circuit Court, p. 52.)

This also should be given consideration with respect to the fact that any justification for restriction of personal rights based upon an emergency should cease when the emergency ceases. (*In re Egan*, 8 Fed. Cas. 367.) Consequently, it would seem that not alone has the Government conceded appellant's detention has no connection with the suppression of espionage or sabotage, but also it now devolves upon the Government to show the danger of invasion and how her detention is connected with the emergency arising from a *present* danger of invasion. This they cannot do.

Of course, we ask this Court to keep in mind that at no time do we concede that the President of the United States has authority which he can exercise *in personam*, or by delegation to a military commander, to detain loyal American citizens, even in time of war for a period longer than is necessary to determine their loyalty.

With respect to this, it should be borne in mind by this Court that not alone were American citizens of Japanese ancestry discriminated against, compared with the treatment of fellow citizens of non-Japanese ancestry, but these American citizens of Japanese ancestry were relegated to a position inferior even to that of enemy aliens.

It is a matter of common knowledge that following the outbreak of war restrictions were placed upon the movement of enemy aliens (German and Italian natives), and at the same time those aliens suspected by Army Intelligence, Navy Intelligence, the Federal Bureau of Investigation, and others, were detained. These aliens however were given a semblance of due process, even those suspected as dangerous to this country, in that boards reviewed their cases, and except for a negligible minority released them.

Today, on the waterfront of the Pacific Coast and also in the war production plants, persons who are technically enemy aliens, but whose loyalty to the United States is now admitted, are walking free of restraint.

The relation of this state of facts to equal protection and due process will be later treated.

It may well be essential to supervise persons whose removal is necessary in the interest of national security, directed to the suppression of espionage and sabotage, but assuming for the moment the validity of the temporary exclusion of appellant, pending the determination of her loyalty, or even a step further, her exclusion regardless of her loyalty, such an assumption is no authority for detention after her removal and the establishment of her loyalty. She has lost home, business, her way of life; it is time for the Court to stay the hand of oppression.

To hold that the appellant can be so detained necessitates the overruling of *Ex parte Fields*, 5 Blach., 63 Fed. Cas. 4761; *Ex parte Merryman*, 17 Fed. Cas., p. 144, and *In re Milligan*, 70 U. S. 1, 18 Law. Ed. 281.

B. POWER TO IMPRISON WITHOUT CHARGE, TRIAL OR ANY OTHER PROCESS SHOULD BE BASED ON MORE THAN IMPLICATION FROM PRESIDENTIAL ORDERS AND CONGRESSIONAL STATUTES. THE CONSTITUTIONALITY OF WHICH ORDERS OR STATUTES THEMSELVES MUST BE DEFENDED BY FAR-FETCHED IMPLICATION FROM DEFINITE POWERS GIVEN BY THE CONSTITUTION.

The appellees in this case are finally driven to the expedient of saying "The executive order by *implication* authorizes regulations providing for such detention". (Appellees' Brief, Circuit Court, p. 46.)

It is a novel theory that detention of a loyal American citizen should be considered an *implied* part of the authority of the War Relocation Authority under an executive order "which does not expressly grant this important authority to detain citizens not accused of crime or disloyalty". (See Note 49, p. 47, Appellees' Brief, Circuit Court.)

Appellees cite numerous cases to the effect that the existence of war gives rise to a special standard for appraising the constitutionality of the delegation of congressional war powers. (See Appellees' Brief, Circuit Court, p. 57.)

None of these cases involves the imprisonment of a citizen of the United States who has no "proclivity or intention to leave the United States".

In *U. S. v. Carolyn Products*, 304 U. S. 44, the query was stated whether "There may be a narrower scope for the operation for the presumption of constitutionality when legislation appears on its face * * * to be within the first Ten Amendments".

In *Schneider v. Irvington*, 308 U. S. 147, at 161, Justice Roberts answered that question.

"In every case, therefore, when legislative abridgement of rights is asserted, the Courts should be astute to examine the facts of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of Democratic institutions. *Individual rights are specifically provided for by the Constitution as are governmental powers*, and it should be remembered that the Government was in effect created for the protection of those rights. When these so-called unalienable rights are involved, the limitation on Government power is not as important as is the limitation of the individual's rights."

Considerable reliance is placed by appellees upon the recent case of the Supreme Court, *Hirabayashi v. U. S.*, 320 U. S. 81. That conviction took place on May 9, 1942.

Chief Justice Stone's opinion points out the restrictive application of that decision when he said:

"We decide only the issue as we have defined it—we decide only that the curfew order as applied and *at the time* it was applied was within the boundaries of the war power." (p. 102.)

One of the justifications for sustaining the validity of Public Law 503, in so far as it applied to curfew orders was the fact that curfew orders were in effect

when the law was passed, and so within the contemplation of the law-making body.

(See p. 91 of decision.)

Appellees admit, however, that with respect to detention "legislative history does not indicate that detention was contemplated or that Congress was advised that it was anticipated, at the time of the enactment of the statute". (Appellees' Brief, Circuit Court, p. 55.)

Since detention was not within the contemplation of Congress when it passed Public Law 503 it is difficult to determine how that law is authority for the detention.

A further defect arises, as to the constitutionality of Public Law 503 as far as detention is concerned, or at all, in the light of the decisions of the Supreme Court in *U. S. v. Cohen Grocery*, 225 U. S. 81, 41 S. Ct. 298 or of *Schechter v. U. S.*, 295 U. S. 495.

In the *Schechter* case this Court said:

"Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate as they proved to be both in war and in peace, but these powers of the National Government are limited by the Constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary."

While the *Schechter* case referred to times of war, it in fact dealt with an emergency not arising from

war. In the *Cohen Grocery* case, *supra*, this language appeared:-

"We are of the opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guarantees and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing upon. (Citing cases including *Ex parte Milligan*.) It follows that in testing the operation of the Constitution upon the subject here involved, the question of the existence or non-existence of a state of war becomes negligible and we put it out of view." (p. 300.)

This language is particularly pertinent in view of the fact that the appellant is relying upon plain language occurring in the Bill of Rights, guaranteeing her against, among other things, the type of restraint which she is now suffering with the incidental degradation which is hers, while by contrast, those holding her under restraint state as their authority for such detention, that it is theirs by *implication* and "the detention is merely a necessary incident to this vital social planning". (See Appellant's Brief, Circuit Court, p. 46.)

In the case of *Constantin v. Smith*, the decision in the lower Court appears in 57 Fed. (2d) 227. The language used has particular relevance in view of the fact that the appellees claim the right to imprison or detain under armed guard a citizen and found that right in an *implication*. In the *Constantin* case, the Court said:

"Looking first to defendant's contention, we think it might reasonably be expected, that, in the support of pretention so vast, of authority so absolute, and uncontrolled as here asserted, of power in the executive of a state by fiat to suspend not only the Constitution of the State, but of the United States, to the extent of depriving their courts of jurisdiction to inquire into and redress grievances, defendants would point to enabling constitutional provisions, state or national; or at least clear and convincing authority supporting their claim."

"We have examined the constitutional provision which they rely on. We have examined every authority cited by them. We have found none, we conclude that none exist which is against the claim of deprivation of property, supports defendant's claim to immunity from judicial inquiry, and none which has even considered, much less declared, that a court of the United States may not, by injunction, prevent the deprivation of property, such as is here occurring." (p. 235.)

In the case at bar, the Government as distinguished from claiming an absolute control over property, now claims that they have an absolute unrestrained and unreviewable claim over the liberty of citizens.

The Court also said:

"We reject then as entirely without substance, contrary to the genius of the two governments, Federal and State, and opposed to the very conception upon which this government was founded and has been maintained, the contention that any officers of a state, whether Executive, Legislative or Judicial, can, by proclamation or otherwise,

erect himself above the jurisdiction of the Federal courts, withdraw his actions affecting private property from judicial inquiry, and insulate himself from judicial process and consequences of disobedience to the judicial decree." (p. 236.)

(Of course, it has heretofore been held that the police power, like other powers, is subordinate to the Constitution (*Stockwell v. State*, 221 S. W. 932).)

See, also,

Stoutenburgh v. Frazier, supra.

Appellees would have this Court believe that such arbitrary power, achieved by implication, is theirs because they cloak it under the designation "War Powers".

For a classic dissertation upon the nature and extent of "War Powers" we refer this Court to the case of *Griffin v. Wilcox*, 21 Ind. 370.

THE EXERCISE OF DISCRETIONARY POWER BY THE EXECUTIVE, EVEN IN AN EMERGENCY, IS SUBJECT TO JUDICIAL REVIEW AS TO THE FACTUAL EXISTENCE OF THE EMERGENCY AND THE NECESSITY FOR AND THE REASONABLENESS OF THE PARTICULAR ACT.

Reliance also is placed upon the theory that in the exercise of war power, the Executive and Congress have wide scope for the exercise of judgment and discretion in determining the nature or extent of threatened injury and selecting the means for resisting it.

Language to that effect appearing in the *Hirabayashi* case, supra, is quoted at page 59 of appellees' brief.

While some discretion does rest with the Executive and with Congress, as it was there pointed out, the Supreme Court in a series of cases has held that the exercise of such discretion is subject to review by the Courts. See

Sterling v. Constantin, 287 U. S. 378, at p. 400.

The Court said that the fact that the Executive has a range of discretion incidental to his power to suppress disorder does not mean, that no matter how unjustified the action of the Government may be, that it is conclusively supported by mere executive fiat and then said:

"The assertion, that such action can be taken as conclusive proof of its own necessity and must be accepted as in its due process of law, has no support in the decisions of this court." (See pp. 400-402.)

The *Hirabayashi* case reaffirms this.

THE ADMINISTRATIVE PROCESS, WHICH IT IS CLAIMED APPELLANT HAS FAILED TO EXHAUST, DOES NOT AMOUNT TO DUE PROCESS AND MAKES NO REAL PROVISION FOR RELIEF BY GIVING A FINAL DISCHARGE FROM IMPRISONMENT UPON DETERMINATION OF LOYALTY OF THE CITIZEN DETAINED OR IMPRISONED.

In the decisions "due process of law" is repeatedly referred to. It should be borne in mind that appellant in this case has never been charged with any offense, has had no opportunity to defend herself against any charge, has never been tried for any offense with or without a jury, has never had an opportunity to secure witnesses on her own behalf; she has had no process

of any kind. Despite this, appellees would have the Court believe she is barred from relief on the ground that there is administrative remedy.

She has been incarcerated now for a period of two years. She has been moved willy nilly from place to place, from State to State. She is under armed guard. She has suffered all the degradation of the convicted felon, despite the fact that she is admitted to be a loyal citizen, and despite the fact that it has been "determined that in so far as her personal characteristics and loyalty are concerned, her release would not be detrimental to the war program and to the public peace and security". (Appellees' Brief, Circuit Court, p. 31.)

The inadequacy of the administrative relief offered appellant is shown by the fact that Miss Endo is informed "that she is not at the time eligible for employment in plants and facilities vital to the war effort". (See Appendix, p. 13.)

War Relocation Authority Form No. 131 (see Appendix F) informs Miss Endo that she is eligible "to be entered on the list of those cleared for indefinite leave" and specifically provides that leave is for "the purpose of employment or residence in the Eastern Defense Command as well as other areas", and refers to Administrative Instruction No. 22. (See page 28 of Appendix, Part 2 of which reads as follows):

"The applicant for a permit must show that he has a specific job opportunity with a prospective employer at a designated place outside the relocation center and outside the Western Defense Command."

Section 9 of Administrative Instruction No. 22 reads as follows:

"Every applicant issued a permit pursuant to this instruction * * * will remain in the constructive custody of the military commander * * *. Any such permit may be revoked at any time * * * and the applicant * * * be required to return to the relocation center or such other place as the director specifies if the director shall find such revocation to be necessary in the public interest."

The most that can be said of the administrative process now in effect is that Mitsuye Endo may apply for a parole from a concentration camp provided she is able to establish that she has

(1) A specific job opportunity, or independent means, and

(2) That the community where she has the job opportunity is willing to accept her, and

(3) A willingness to make such reports as the authority desires.

Appellants in their brief in the Circuit Court have so conceded. (See p. 10 thereof.)

Laws of similar import directed against so-called "vagrants" have been held unconstitutional. Such a decision arose in the Ninth Circuit years ago as a result of such attempted statutory restriction in Hawaii. (See *Hawaii v. Anduha*, 48 Fed. (2d) 171 (1931).)

In that case, the Court said:

"The Constitution and the laws are framed for the public good and the protection of all citizens

from the highest to the lowest and no one may be restrained of his liberty unless he has transgressed some law. Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony would be most oppressive and unjust and destroy all the rights which our Constitution guarantees." (p. 172.)

The effect of this decision is to establish the right to habitually "loaf"; "loiter" or "idle".

The Court further said:

"In any view we take of it the act trenches upon the inalienable rights of the citizen to do what he will and when he will, so long as his course of conduct is not inimicable to himself or to the general public of which he is a part." (p. 173.)

In regard to the obligation attempted to be imposed upon petitioner to make "reports", we refer the Court again to *Brynder v. Johnson*, 5 Fed. Rep. (2d) 238.

In that case, the petitioner for writ of habeas corpus was arrested by an agent of the Department of Justice on the charge that he was engaged in a Red or Communistic plot to overthrow our form of Government.

A valid order of deportation was outstanding against him under which he was being detained at the time he sought the writ of habeas corpus. The Court held he could not be imprisoned indefinitely pending recognition of the Soviet Government by the United States because of inability to deport him to Russia. Since

the right to arrest and hold and imprison an alien is merely an incident of the right to exclude and deport and that no Court or tribunal has power to hold indefinitely any sane citizen or alien in prison, except as punishment for crime.

The Court further held that the alien could not be required to furnish bond and report at intervals to the Immigration Commissioner until he could be deported to Russia. (See p. 239.)

There also it was conceded that petitioner was not being held as punishment for crime.

The invalidity of requiring a showing of independent means, a specific job opportunity, and community acceptance would appear to have been determined adversely to the appellees in *Edwards v. California*, 62 S. Ct. 164, 314 U. S. 160.

APPELLANT IS OFFERED RELIEF SIMILAR TO PAROLE OR PROBATION OFFERED A CONVICTED FELON EXCEPT THAT THE RELIEF OFFERED APPELLANT IS NOT AS COMPLETE AS THAT AVAILABLE TO THE FELON.

The utmost relief available to appellant is a modified form of the parole available to the felon who has properly comported himself in a penitentiary.

Yet the lowest felon who is granted parole—or the probationer—has achieved a status superior to that which appellant may anticipate. The paroled felon, or probationer, knows that *his* acts alone shall determine his fate; his own good behavior is guarantee against a resumption of imprisonment. Even while

on parole or probation the felon knows imprisonment can reoccur only after charges and a hearing.

The parolee or probationer also knows the duration of the period during which the government has the *right*, a penalty for the original wrongdoing, to supervise his activities, limit his activities, and require him to give the identical reports required of appellant in the case at bar.

The utmost relief available to appellant, while similar to the parole or probation given to the felon, is not as great a privilege. It is designated an "indefinite leave". The very name indicates its inadequacy and lack of finality, as relief offered a loyal citizen now imprisoned.

As before stated the parolee or probationer by his own acts determines his own future. And at end of a set term he is free of his restrictions and achieves liberty similar to that of his fellow citizens. Regardless of the innocuous activities, the blameless or praiseworthy life of appellant, in maintenance of the character of loyal citizen given her in appellees' brief, at the fiat of the Director of the W.R.A. on the ground of public interest, without charge, investigation, trial or appeal, she may be ordered to return to her prison or elsewhere as the Director may see fit.

This may result from acts of irresponsible third parties. In fact under the theory of the government, an attack by rowdies, citizen or alien, upon appellant might well constitute sufficient reason to result in the reimprisonment of the victim of the unprovoked attack—the appellant.

As was pointed out in *Bonder v. Johnson*, supra, even the alien arrested on the charge of conspiracy to overthrow the government and ordered deported is not obliged to continuously, indefinitely make reports of his activities or movements to a governmental agency.

The parolee, the probationer, the imprisoned felon and the appellant have in common only the degradation of being set apart from their fellow Americans.

The drunk, the insane, the prostitute, the enemy alien, all are granted a hearing before being deprived of liberty. If there is no hearing sufficient to meet the requirements of due process of law the ancient writ of habeas corpus opens the doors of prison, hospital or detention barracks and gives deliverance.

"All hope abandon ye who enter here" appears only at the gate of the concentration camp reserved for loyal American citizens like appellant.

THE LEGALITY OF THE RESTRICTIONS UPON THE RIGHTS OF CITIZENS IS ALWAYS DETERMINED IN THE LIGHT OF EXISTING CIRCUMSTANCES. IN CASE OF APPLICATION FOR WRIT OF HABEAS CORPUS THAT MEANS CIRCUMSTANCES EXISTING WHEN THIS COURT PASSES UPON THE QUESTION.

Again the present reasonableness of such restrictions, assuming without admitting their original legality, is the test which must now be applied to them.

In *Schuyler v. Drumm*, District of Pa., 51 Fed. Sup. 383, and in *Ebel v. Drumm*, District of Mass., 52 Fed.

Sup. 189, decided in August and September respectively of 1943, individual exclusion orders issued by the military commander in the Eastern Defense Command, whose authority, the legality of which was based upon Executive Orders No. 9066 and 9102 were held invalid.

The Court said:

"There was not a present reasonable and substantial basis for the judgment of the military authorities that the threat of espionage and sabotage, which is the basis of executive orders, was real and imminent."

In April, 1944, martial law was ruled invalid in Hawaii. (See *Kahanamoku v. Duncan* and *Stein v. White*, Nos. 10,763-10,764, now pending Ninth Circuit.)

On the Pacific Coast dim-out orders had been lifted, and other restrictions had been done away with. Enemy aliens are now back on the coast. Persons of non-Japanese ancestry heretofore excluded are now at large in San Francisco, so that under any test of present reasonable and substantial threat of espionage or sabotage, the appellees fail.

In August, 1942, two persons of Japanese ancestry who had filed suit in the District Court in Los Angeles to require that they be permitted to reenter California had a motion for dismissal made by the United States Attorney granted because the restrictions were lifted as to them. One was the widow of a Japanese

American who died in defense of the American way of life.

Shiramizu et al. v. Bonesteel et al., Superior Court, State of California, in and for the County of Los Angeles.

At present in California there are soldiers on leave, soldiers convalescent from wounds, and still others in training for combat—all of Japanese ancestry—and some Japanese married to Caucasians.

Of course, we reiterate once again that regardless of the existence of such a threat or emergency, the appellees have conceded that the appellant has no connection or desire to be connected with any such activities against the Government.

Thus, we have a situation where not alone has the emergency, if any abated, but her loyalty has been determined. Nevertheless, true to historical precedent, a grasping executive seeks to maintain extra-constitutional power, originally claimed to be justified by proclamation of an emergency coupled with alleged uncertainty as to the loyalty of this individual, after her loyalty has been established and the emergency, if any, has passed.

That has been the history of executive power preceding the Magna Charta and the Declaration of Independence, which necessitated a written Constitution with an added Bill of Rights to protect the citizen from the Frankenstein creature which too often evolves from the servant the citizens created—called Government.

THE APPLICATION OF EXCLUSION ORDERS SOLELY TO CITIZENS OF JAPANESE ORIGIN, AND THE INCARCERATION OF SUCH CITIZENS ONLY, AND THE RESTRICTIVE SUPERVISION OF THE FREEDOM OF ONE GROUP OF CITIZENS BECAUSE OF RACIAL ORIGIN CONSTITUTES A DENIAL OF DUE PROCESS OF LAW.

While it is true the *Hirabayashi* case at page 100 remarks that sometimes racial discriminations may be relevant, we do not agree they are relevant in these cases. Nor has any showing of relevancy been made.

The very lack of hearing, where the Japanese ancestry group was concerned which was granted even to enemy aliens, constitutes a lack of due process. As was heretofore pointed out, the vast group of Italian aliens and German aliens were cleared of disloyalty by October, 1942, and permitted to return to the West Coast. Hearing boards were established for them. (See Survey of Activities of Department of Justice issued by Attorney General Biddle Dec. 1942.)

The Army was well able to test individual loyalty when it inducted evacuees into the Army and so enabled citizens of Japanese blood to spend that blood on Italian battlefields and elsewhere.

The facts and circumstances which go to establish the reasonableness of a classification essential to constitute due process necessarily assume a relation between the facts and the conclusion drawn therefrom. Race has no bearing on any possible tendency to sabotage or disloyalty. It was the alleged danger of sabotage and espionage which was the basis of the Executive Orders under which these people were evacuated and detained.

In *Edwards v. California*, supra, it was stated:

"We should say now and in no uncertain terms that a man's mere property status without more cannot be used by a state to test, qualify, or limit, his right as a citizen of the United States * * *

The mere state of being without funds is a neutral fact * * * constitutionally an irrelevance, like *race*, creed, or color."

In *Skinner v. Oklahoma*, 316 U. S. 535, the Court said:

"* * * when the law lays an unequal hand on those who have committed intrinsically the same type of offense and sterilizes one and not the other, it has made asvidious a discrimination as if it had selected a particular *race* or nationality for oppressive treatment."

It is true that the Executive Orders did not mention citizens of Japanese ancestry.

The Executive Orders said: "any person" and Public Law 503 used the term "whoever". The administration, however, was based on race which has no bearing on or connection with a tendency to sabotage, espionage, disloyalty in any of their phases. (See 28 Cor. Law Quarterly, at p. 453.) (There are two excellent articles relating to the treatment of citizens of Japanese ancestry citing numerous cases in this article.)

These actions by the military authorities in their treatment of American citizens of Japanese ancestry as contrasted with the treatment of other citizens, and particularly of enemy aliens, constitutes administra-

tion "by public authority with an evil eye and an unequal hand", so as to deprive the whole procedure of constitutional validity within the decision of *Yick Wo v. Hopkins*, 118 U. S. 356, despite the all inclusive language of the orders and the law.

THE COURT MUST EITHER OVERRULE IN RE MILLIGAN AND SIMILAR CASES OR GRANT APPELLANT HER FREEDOM.

We have heretofore referred to the fact that to permit detention of a loyal American citizen without charge under the order of a military commander necessitates the overruling of the cases of *Ex parte Fields*, *In re Merryman*, and *In re Milligan*, *supra*.

The appellees seek to circumvent the plain language of the *Milligan* case, by saying that the Executive has not in this case attempted "to perform the functions of the judiciary by conducting a trial of a civilian before a military tribunal".

(See Appellees' Brief, Circuit Court, p. 64.)

We suppose this may be construed as an admission that if this appellant were being detained as the result of a trial of a military tribunal, a writ of habeas corpus would be available to end such detention.

At least, such a trial would constitute an attempt, abortive though it might be, at due process. We fail to see how a stronger case for the constitutionality of detention is established where there is no charge, no trial before the detention, where if there were suspicions, investigation has dissipated them, *than* in a

case where there were suspicions, charges, a trial, witnesses, an attorney, and the other attributes leading to a conviction, even though the tribunal is a military court.

It would seem that if the *Milligan* case is still law and a citizen cannot be imprisoned as a result of conviction by a military tribunal after a trial before the military tribunal, a *fortiori* imprisonment by mere order of a military commander because of an unfortunate choice in ancestry would likewise be illegal.

Even Quirin and his fellow saboteurs were given a trial with the right to an attorney, and all the other rights incidental to a trial, before the authority, found in the Presidential Order which authorized the military commission, was exercised.

Likewise the appellees state we misplace emphasis on principles relating to martial law. The only reason that martial law is applicable to the present situation is the fact that in the *absence of martial law*, the orders of the military commander lose the semblance of legality with which a valid existence of martial law might cloak them. (See *Sterling v. Constantin*, supra; *U. S. v. Adams*, 26 Fed. (2d) 141; *Constantin v. Smith*, 287 U. S. 378.)

DETENTION OF JURORS OR MATERIAL WITNESSES FOR SHORT PERIODS OR OF PERSONS INFECTED WITH DISEASE FOR ITS DURATION UNDER STATUTES PROVIDING FOR DUE PROCESS IS NOT AUTHORITY FOR DETENTION OF A LOYAL CITIZEN FOR 23 MONTHS TO PREVENT ESPIONAGE OR SABOTAGE OR IN THE INTEREST OF NATIONAL SECURITY.

In conclusion, we advert to the suggestion by appellees that the present confinement is not for the purpose of punishing criminals or preventing crime, and wherein it is compared to such short detention of jurors or material witnesses, or of persons who are dangerous due to physical or mental disease. (See Appellees' Brief, Circuit Court, p. 65.)

Of course, it has been held, that the *temporary* detention of a person who has a dangerous or communicable disease pending its cure or of a person suspected of having it pending determination is valid when there is statutory authority for detention providing due process. But either due process of law provides for a determination of the reasonableness of the detention by connecting the detained person with the *charge*, or a writ of habeas corpus will issue.

See

39 *Corpus Juris Secundum*, Health, pp. 828-829.

At the outset, the appellant was suspected of infection by the virus of disloyalty. She has undergone all tests and passed them but remains in quarantine. The appellees' analogy fails.

**THE HIRABAYASHI CASE IS NOT A BAR TO
APPELLANT'S RELIEF.**

It is submitted that the Supreme Court in the *Hirabayashi* case specifically reserved the question of whether a failure to report to a civil control station preliminary to exclusion was a crime.

The Court there restricted even detention to temporary detention.

The Court there stated that an opportunity could be given to establish loyalty in some appropriate proceeding.

The Court there refused to determine whether the administrative remedy for the establishment of exemption from application of the orders was the only remedy or would have to be first exhausted.

The Court there refused to determine whether the liberties of the applicant could be restored only outside the areas in question. The following language appears:

"But if it were plain that no machinery were available whereby the individual could demonstrate his loyalty as a citizen in order to be reclassified, questions of a more serious character would be presented." (p. 109.)

Justice Murphy said:

"In my opinion this goes to the very brink of Constitutional power." (p. 111.)

Again it was pointed out there that the violation of the curfew order arose during a critical military phase and this language was used:

"Whether such a restriction is valid today is another matter." (p. 113.)

Even in June, 1943, the date of the *Hirabayashi* decision, the validity of even a curfew restriction might be "another matter"; what is the status of the detention *now* of a loyal citizen beyond the exclusion area?

The fact that *Korematsu v. U. S.* is to be heard by the Supreme Court even though his offense was committed in May, 1942, again strengthens appellant's prayer for relief.

It is respectfully prayed that this Court forthwith award petitioner and appellant a writ of habeas corpus and proceed in a summary way to determine the facts of the case and to dispose of said appellant as law and justice require under the circumstances as they now exist, by ordering appellant's release.

Dated, San Francisco, California,
September 14, 1944.

Respectfully submitted.

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(Appendices A to H Follow.)

Appendices.

Appendix A

Executive Order 9056 dated February 19, 1942,

7 F. R. 3407.

AUTHORIZING THE SECRETARY OF WAR
TO PRESCRIBE MILITARY AREAS.

WHEREAS the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 635 (U. S. C., Title 50, Sec. 104);

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded there-

from, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restricted areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore granted

under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder.

THE WHITE HOUSE,

February 19, 1942.

Appendix B

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 9102, dated March 18, 1942, 7 F. R. 2165.

ESTABLISHING THE WAR RELOCATION AUTHORITY IN THE EXECUTIVE OFFICE OF THE PRESIDENT AND DEFINING ITS FUNCTIONS AND DUTIES.

By virtue of the authority vested in me by the Constitution and statutes of the United States, as President of the United States and Commander in Chief of the Army and Navy, and in order to provide for the removal from designated areas of persons whose removal is necessary in the interests of national security, it is ordered as follows:

1. There is established in the Office for Emergency Management of the Executive Office of the President the War Relocation Authority, at the head of which shall be a Director appointed by and responsible to the President.

2. The Director of the War Relocation Authority is authorized and directed to formulate and effectuate a program for the removal, from the areas designated from time to time by the Secretary of War or appropriate military commander under the authority of Executive Order No. 9066 of February 19, 1942, of the persons or classes of persons designated under such Executive Order, and for their relocation, maintenance, and supervision.

3. In effectuating such program the Director shall have authority to (a) Accomplish all necessary evacuation not undertaken by the Secretary of War or appropriate military commander, provide for the relocation of such persons in appropriate places, provide for their needs in such manner as may be appropriate, and supervise their activities.

(b) Provide, insofar as feasible and desirable, for the employment of such persons at useful work in industry, commerce, agriculture, or public projects, prescribe the terms and conditions of such public employment, and safeguard the public interest in the private employment of such persons.

(c) Secure the cooperation, assistance, or services of any governmental agency.

(d) Prescribe regulations necessary or desirable to promote effective execution of such program, and, as a means of coordinating evacuation and relocation activities, consult with the Secretary of War with respect to regulations issued and measures taken by him.

(e) Make such delegations of authority as he may deem necessary.

(f) Employ necessary personnel, and make such expenditures, including the making of loans and grants and the purchase of real property, as may be necessary, within the limits of such funds as may be made available to the Authority.

4. The Director shall consult with the United States Employment Service and other agencies on

employment and other problems incident to activities under this order.

5. The Director shall cooperate with the Alien Property Custodian appointed pursuant to Executive Order No. 9095 of March 11, 1942, in formulating policies to govern the custody, management, and disposal by the Alien Property Custodian of property belonging to foreign nationals removed under this order or under Executive Order No. 9066 of February 19, 1942; and may assist all other persons removed under either of such Executive Orders in the management and disposal of their property.

6. Departments and agencies of the United States are directed to cooperate with and assist the Director in his activities hereunder. The Departments of War and Justice, under the direction of the Secretary of War and the Attorney General respectively, shall insofar as consistent with the national interest provide such protective, police and investigational services as the Director shall find necessary in connection with activities under this order.

7. There is established within the War Relocation Authority the War Relocation Work Corps. The Director shall provide, by general regulations, for the enlistment in such Corps, for the duration of the present war, of persons removed under this order or under Executive Order No. 9066 of February 19, 1942, and shall prescribe the terms and conditions of the work to be performed by such Corps, and the compensation to be paid.

8. There is established within the War Relocation Authority a Liaison Committee on War Relocation

which shall consist of the Secretary of War, the Secretary of the Treasury, the Attorney General, the Secretary of Agriculture, the Secretary of Labor, the Federal Security Administrator, the Director of Civilian Defense, and the Alien Property Custodian, or their deputies, and such other persons or agencies as the Director may designate. The Liaison Committee shall meet at the call of the Director and shall assist him in his duties.

9. The Director shall keep the President informed with regard to the progress made in carrying out this order, and perform such related duties as the President may from time to time assign to him.

10. In order to avoid duplication of evacuation activities under this order and Executive Order No. 9066 of February 19, 1942, the Director shall not undertake any evacuation activities within military areas designated under said Executive Order No. 9066, without the prior approval of the Secretary of War or the appropriate military commander.

11. This order does not limit the authority granted in Executive Order No. 8972 of December 12, 1941; Executive Order No. 9066 of February 19, 1942; Executive Order No. 9095 of March 11, 1942; Executive Proclamation No. 2525 of December 7, 1941; Executive Proclamation No. 2526 of December 8, 1941; Executive Proclamation No. 2527 of December 8, 1941; Executive Proclamation No. 2533 of December 29, 1941; or Executive Proclamation No. 2537 of January 14, 1942; nor does it limit the functions of the Federal Bureau of Investigation.

Appendix C**STATUTES**

Act of March 21, 1942 (Public Law 503, 77th Cong., 2d Sess., c. 191, 56 Stat. 173, U. S. C., Tit. 18, Sec. 97a).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$5,000 or to imprisonment for not more than one year, or both, for each offense.

Approved, March 21, 1942.

Appendix D

PROCLAMATIONS

PUBLIC PROCLAMATION No. 8 OF GENERAL J. L. DEWITT (7 F. R. 8346).

June 27, 1942

"That: The people within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, and the Public Generally:

"Whereas by Public Proclamation No. 1,¹ dated March 2, 1942, this headquarters, there were designated and established Military Areas Nos. 1 and 2, and by Public Proclamation No. 2,² dated March 16, 1942, this headquarters, there were designated and established Military Areas Nos. 3, 4, 5, and 6, and

"Whereas the present situation within these military areas requires as a matter of military necessity that persons of Japanese ancestry who have been evacuated from certain regions within Military areas Nos. 1 and 2 shall be removed to Relocation Centers for their relocation, maintenance and supervision and that such Relocation Centers be designated as War Relocation Project Areas and that appropriate restrictions with respect to the rights of all such persons of Japanese ancestry, both alien and non-alien, so evacuated to such Relocation Centers and of all other persons to enter, remain in, or leave such areas be promulgated;

¹7 F. R. 2320.

²7 F. R. 2405.

Now, Therefore, J. J. L. DeWitt, Lieutenant General U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General of the Western Defense Command, do hereby declare that:

§ 103.2 *War Relocation Project Areas: Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona.* (a) Pursuant to the determination of military necessity hereinbefore set out, all the territory included within the exterior boundaries of each Relocation Center now or hereafter established within the Western Defense Command, as such boundaries are designated and defined by orders subsequently issued by this headquarters, are hereby designated and established as War Relocation Project Areas.

(b) All persons of Japanese ancestry, both alien and nonalien, who now or shall hereafter be or reside, pursuant to exclusion orders and instructions from this headquarters, or otherwise, within the bounds of any established War Relocation Project Area are required to remain within the bounds of such War Relocation Project Area at all times unless specifically authorized to leave as set forth in paragraph (c) hereof.

(c) Any person of Japanese ancestry, both alien and nonalien, who shall now or hereafter so be or reside within any such War Relocation Project Area shall, before leaving said Area, obtain a written authorization executed by or pursuant to the express

authority of this headquarters setting forth the effective period of said authorization and the terms and conditions upon and purposes for which it has been granted.

"(d) No persons other than the persons of Japanese ancestry described in paragraph (b) hereof, and other than persons employed by the War Relocation Authority established by Executive Order No. 9102, dated March 18, 1942, shall enter any such War Relocation Project Area except upon written authorization executed by or pursuant to the express authority of this headquarters first obtained, which said authorization shall set forth the effective period thereof and the terms and conditions upon and purposes for which it has been granted.

"(e) Failure of persons subject to the provisions of this Public Proclamation No. 8 to conform to the terms and provisions thereof shall subject such persons to the penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled 'An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving, or Committing any Act in Military Areas or Zones.'

(Seal)

J. L. DeWitt,
Lieutenant General, U. S. Army,
Commanding.

CONFIRMED:

J. A. Ulio,
Major General
The Adjutant General."

Appendix E

WRA FORM 258a

WAR RELOCATION AUTHORITY

Formerly at Tule Lake

WRA-258a

Project *Central Utah*Date *August 16, 1943*

No. 29

List of Evacuees Granted

Leave Clearance by the Director
of the War Relocation Authority

Name	Family No.	Address	Occupation	Sex	Age
Eado, Mitsuy	27908	2916-C (Tule Lake Address)	Office clerk-typist	F	22

(Signed)

Assistant Director

This leave clearance is based on a consideration of Forms DSS 304A and WRA 126a, or upon Form WRA 126 Rev. A check of question 28 need not be made by the Project Director. Pursuant to a recommendation of the Japanese-American Joint Board, the Project Director may issue to these individuals indefinite leaves for the purpose of employment or residence in the Eastern Defense Command as well as in other areas, provided the provisions of Administrative Instruction No. 22, Revised, are otherwise complied with. The Provost Marshal General's Department of the War Department has determined that these individuals are not at this time eligible for employment in plants and facilities vital to the war effort.

Appendix F

WRA FORM 131

WRA-131

WAR RELOCATION AUTHORITY
NOTICE OF ACTION ON APPLICATION FOR
LEAVE CLEARANCE

To Endo, Mitsuye

29-16-C

Newell, California

You are hereby notified that your application for leave clearance dated 2-19-43 has been considered by the Director, and he has instructed me that

x you are eligible to be entered on the list of those cleared for indefinite leave

* the following special conditions are to attach to any leave issued pursuant to such clearance: your application for leave clearance has been denied because:

This notice does **NOT** authorize departure from the relocation center. A suitable application must be made separately at any time you wish to apply for leave.

8/23/43

(Signed) _____

Date

Project Director

* You are eligible for indefinite leave for the purpose of employment or residence in the Eastern Defense Command as well as in other areas; provided the provisions of Administrative Instruction No. 22, Rev., are otherwise complied with: **The Provost Marshal General's Dept. of the War Department** has determined that you, **Endo Mitsuye** are not at this time eligible for employment in plants and facilities vital to the war effort. (Emphasis ours.)

Appendix G

WAR RELOCATION AUTHORITY APPLICATION FOR INDEFINITE LEAVE

Note: This application will not be accepted unless an application for leave clearance has been earlier filed on Form WRA-126, or accompanies this application.

Relocation Center.....

Family No.....

Center address

1. Name.....

(Last)

(First)

(Middle)

2. What is the purpose of the proposed leave?

3. If you plan to attend any educational institution, state its name and address:

Name

Address

Has your leave been taken up with the National Student Relocation Council?

(Yes)

(No)

4. Have you arranged for any employment?

(Yes)

(No)

Name of employer:

Address of employer:

Occupation of employer:

Your prospective occupation:

Salary: \$.....

Attach copy of letter from employer or other evidence of employment.

5. How much money are you starting out with?
 \$..... Have you property providing an
 income? If so, state nature, amount
 (Yes) (No)

and what arrangements have been made for management or conservation of this property:

6. What arrangements have been made to meet your expenses while on leave? If you have not arranged for employment (as specified in 4 above) or for your subsistence at an educational institution, attach proof that you have adequate means of support.

Upon arrival at the first destination of this leave, I undertake within 24 hours to report to the Director of the War Relocation Authority in Washington, D.C., my arrival, and to confirm my business or school and residential addresses. In case of any change of school, employment, or residence, I will give prompt notice of such change.

.....
 (Date)

.....
 (Signature)

Appendix H

REGULATIONS.

EXCERPTS FROM REGULATIONS GOVERNING ISSUANCE OF LEAVE FOR DEPARTURE FROM A RELOCATION AREA (7 F. R. 7656)

Pursuant to the provisions of Executive Order No. 9102 of March 18, 1942, the following regulations are hereby prescribed:

* * * * *

§5.1 Types of leave. Leaves are of the following types:

(a) A short term leave, for not more than thirty days, for attending to affairs requiring the applicant's presence outside the relocation area;

(b) A leave to participate in a work group, for employment and residence with a group of center residents outside the relocation area, or for such employment with residence remaining within the relocation area; and

(c) An indefinite leave, for employment, education or indefinite residence outside the relocation area.

§5.2 Application for leave. Any person residing within a relocation center who has been evacuated from a military area or who has been specifically accepted by the War Relocation Authority for residence within a center may apply for leave.

§5.3 Proceedings upon application for leave. (a) The Project Director may interview an applicant for leave, shall secure a completed individual record on form WRA-26 for the applicant, and shall secure such further information concerning the applicant and the proposed leave as may be available at the relocation center.

* * * *

(d) The file on each application for indefinite leave, which shall include the application, all related papers, and the Project Director's findings and recommendations, shall be forwarded by the Project Director to the Director. * * *

(e) In the case of each applicant for indefinite leave, the Director, upon receipt of such file from the Project Director, will secure from the Federal Bureau of Investigation such information as may be obtainable, and will take such steps as may be necessary to satisfy himself concerning the applicant's means of support, his willingness to make the reports required of him under the provisions of this part, the conditions and factors affecting the applicant's opportunity for employment and residence at the proposed destination, the probable effect of the issuance of the leave upon the war program and upon the public peace and security, and such other conditions and factors as may be relevant. The Director will thereupon send instructions to the Project Director to issue or deny such leave in each case, and will inform the Regional Director of the Instructions

so issued. The Project Director shall issue indefinite leaves pursuant to such instructions.

(f) A leave shall issue to an applicant in accordance with his application in each case, subject to the provisions of this part and under the procedures herein provided, as a matter of right, where the applicant has made arrangements for employment or other means of support, where he agrees to make the reports required of him under the provisions of this Part and to comply with all other applicable provisions hereof, and where there is no reasonable cause to believe that applicant cannot successfully maintain employment and residence at the proposed destination, and no reasonable ground to believe that the issuance of a leave in the particular case will interfere with the war program or otherwise endanger the public peace and security.

(g) The Director, the Regional Director, and the Project Director may attach such special condition to the leave to be issued in a particular case as may be necessary in the public interest. The special conditions to be so attached shall be governed by regulations or instructions issued from time to time. Every leave issued under the provisions of this Part shall state the conditions that are applicable thereto.

(1) The Project Director shall promptly notify the Regional Director and the Director of the names of any persons who have failed to return to the relocation center upon expiration of leave.

§ 5.5 Transportation and reports during leave.

(a) The Project Director shall provide transportation for the applicant to whom a leave has been issued to the most convenient railroad or bus station. All other necessary transportation shall be arranged for by the applicant and shall not be paid for by the War Relocation Authority. The Authority may, however, make arrangements with employers for transportation connected with group work leave. * * *

(b) * * * Every indefinite leave shall require the person to whom such a leave has been issued to report his arrival, his business or school and residential addresses, and every change of address, to the Director. Reports of changes of addresses shall be required to be made, so far as possible, before leaving any employment, institution or address. The person to whom an indefinite leave has been issued shall further be required to report upon arrival at a new location, and to transmit any further appropriate information concerning his exact business, school and residence addresses promptly upon ascertaining them. The Project Director shall send to the Director reports of all such information received by him.

* * * * *

§ 5.8 Restrictions on leave. * * *

(b) An indefinite leave may permit travel unlimited except as to restrictions imposed by military authorities with reference to military areas or zones, or may permit only travel within designated states, counties, or comparable areas.

(c) Whenever the military authorities of the United States require a pass or other authorization to enter any designated area, no leave shall be issued under the provisions of this part to permit entry into such area until the required pass or authorization has been obtained for the applicant. Whenever such military authorities impose restrictions on movement or conduct within any area, the continuance of such leave shall be contingent upon the observance of any such restrictions in addition to the observance of the other conditions of such leave.

§5.9. Expiration of leave and furlough. (a) Any leave issued, and the furlough granted in connection therewith, under the provision of this part, shall expire:

- (1) On the expiration date stated in the leave; or
- (2) At any time that the person to whom the leave has been issued shall violate any of the conditions applicable to such leave; or

(3) Upon notice from the Director or Project Director that the leave is revoked pursuant to the provisions of paragraph (b) of this section.

(b) The Director may revoke any leave when conditions are so far changed, or when such additional information has become available, that an original application by such person for leave would be denied under the provisions of this part. The Project Director may, on similar ground with the prior approval of the Regional Director, revoke any short term leave. When the Director shall revoke a leave, he will

promptly notify the Regional Director and the Project Director. When a Project Director shall revoke a leave, he shall promptly notify the Director and the Regional Director.

(c) Upon the expiration of any leave issued under this part, the person to whom the leave was issued shall return to the relocation center in which he previously resided unless new leave has been granted or unless he is otherwise directed by the Director.

* * * * *

EXCERPTS FROM REVISED REGULATIONS
OF WAR RELOCATION AUTHORITY
DATED JANUARY 1, 1944 (9 F. R. 154)

Pursuant to the provisions of Executive Order No. 9102 of March 18, 1942, Part 5, Chapter 1, Title 32 of the Code of Federal Regulations is hereby revised to read as follows:

Sec. 5.1 *Types of leave.* Leaves are of the following types:

(a) A short term leave, for not more than sixty days, for attending to affairs requiring the applicant's presence outside the relocation area;

(b) A seasonal work leave, for seasonal employment and residence outside the relocation area; and

(c) An indefinite leave, for indefinite employment, education, or residence outside the relocation area.

Sec. 5.2 *Application for leave.* Any person residing within a relocation center who has been evacuated from a military area or who has been specifically accepted by the War Relocation Authority for residence within a relocation center may apply for leave. No such person shall depart from a relocation area before receiving leave.

Sec. 5.3 *Proceedings upon application for leave.*

(a) Short term leaves, seasonal work leaves, and indefinite leaves may be issued by the Project Director in accordance with the provisions of this part, as supplemented by instructions issued by the Director from time to time.

(b) Except as may otherwise be determined by the Director, every person eligible to apply for leave who is 17 years of age or older shall file an application for leave clearance before he shall be eligible for leave. After such investigation as may be prescribed by instructions issued by the Director, the Project Director shall forward the application to the Director with his recommendations. The Director will secure from the Federal Bureau of Investigation such information as may be obtainable and will take such additional steps as may be necessary to determine the probable effect of the issuance of indefinite leave to the applicant upon the war program and upon the public peace and security. The Director will thereupon approve or disapprove the application and instruct the Project Director accordingly. A person whose application for leave clearance is disapproved shall be ineligible to receive indefinite leave and shall be transferred to the Tule Lake Center in Northern California. A person resident at the Tule Lake Center whose application for leave clearance is approved shall be transferred to another center.

(c) Indefinite leave may be issued prior to approval of an application for leave clearance only in accordance with instructions issued by the Director from time to time. In the case of each application for indefinite leave, the Director will cause such steps to be taken as may be necessary to satisfy himself concerning the applicant's willingness to make the reports required of him under the provisions of this Part, his means of support, the conditions and fac-

tors affecting his successful maintenance of residence at the proposed destination, the probable effect of the issuance of the leave upon the war program and upon the public peace and security, and such other conditions and factors as may be relevant. The Director will issue instructions covering the issuance or denial of indefinite leave in each such case. The Project Director shall issue or deny indefinite leaves pursuant to such instructions.

(d) A leave shall issue to an applicant in accordance with his application in each case, subject to the provisions of this Part and under the procedures herein provided, as a matter of right, where the applicant agrees to make the reports required of him under the provisions of this Part and to comply with all applicable provisions hereof, where there is no reasonable cause to believe that he will not have employment or other means of support or that he cannot otherwise successfully maintain residence at the proposed destination, and where there is no reasonable cause to believe that the issuance of leave in the particular case will interfere with the war program or otherwise endanger the public peace and security.

(e) Such special conditions may be attached to the leave to be issued in a particular case as may be necessary in the public interest. The special conditions to be so attached shall be governed by instructions issued from time to time. Every leave issued under the provisions of this Part shall state the conditions that are applicable thereto.

(f) The Project Director shall promptly notify the applicant of the approval or disapproval of an application for leave or leave clearance, and of any special conditions attached to the approval of an application for leave, with a statement of the reasons therefor. In the case where the application for leave has been disapproved, or has been approved subject to special conditions, the Project Director shall advise the applicant of his right to appeal under the provisions of Sec. 5.4.

(h) The Project Director shall promptly notify the Director of the names of any persons who have failed to return to the relocation center upon expiration of leave.

Sec. 5.5 *Leave Assistance; reports during leave.*

(a) The Project Director shall provide transportation for the applicant to whom a leave has been issued to the most convenient railroad or bus station. Assistance in meeting transportation costs to destination and initial subsistence expenses may be provided, in accordance with instructions issued by the Director from time to time, to persons to whom indefinite leave has been granted.

(b) * * * Each applicant for indefinite leave shall be required to agree to notify the Director promptly of his arrival at destination, his business or school and residential addresses, and all subsequent changes in school, employment, or residence.

Sec. 5.7 *Restrictions on leave.* * * *

(b) Any indefinite leave may permit travel unlimited except as to restrictions imposed by military authorities with reference to military areas or zones, or may permit only travel within designated states, counties, or comparable areas.

(c) Whenever the military authorities of the United States require a pass or other authorization to enter any designated area, no leave shall be issued under the provisions of this Part to permit entry into such area until the required pass or authorization has been obtained for the applicant. Whenever such military authorities impose restrictions on movement or conduct within the area, the continuance of such leave shall be contingent upon the observance of any such restrictions in addition to the observance of the other conditions of such leave.

Sec. 5.8 *Expiration of leave.* (a) Any leave issued under the provisions of this Part shall expire:

- (1) On the expiration date stated in the leave; or
- (2) On the return to a relocation center, as a resident, of the person to whom the leave has been issued;

or -

(3) At any time that the person to whom the leave has been issued shall violate any of the conditions applicable to such leave; or

(4) On notice from the Director, the Project Director, or the Relocation Supervisor that the leave is

revoked pursuant to the provisions of paragraph (b) of this section.

(b) The Director may revoke any leave when conditions are so far changed, or when such additional information has become available, that an original application by such person for leave would be denied under the provisions of this Part. The Project Director may revoke any short term leave and the Relocation Supervisor may revoke any seasonal work leave on similar grounds. When the Project Director or Relocation Supervisor revokes a leave he shall promptly notify the Director.

**RULES OF PROCEDURE AND FORMS OF WAR
RELOCATION AUTHORITY**

War Relocation Authority's Administrative
Instruction No. 22

**WAR RELOCATION AUTHORITY
WASHINGTON**

July 20, 1942

ADMINISTRATIVE INSTRUCTION No. 22

Subject: Temporary procedure for issuance of permits to individuals or single families to leave relocation centers for employment outside such centers and the Western Defense Command.

This Instruction applies only to the issuance of permits to individuals or single families to leave relocation centers for employment outside such centers and outside the Western Defense Command. It does not

apply to such outside employment for groups of evacuees; in the case of such groups, present procedures may continue to be followed:

° The program of outside employment will be further developed as we accumulate experience.

1. Any American citizen of Japanese ancestry within a relocation center, who has never at any time resided or been educated in Japan, may apply to the Project Director for a permit to leave the center for employment outside the center and outside the Western Defense Command.

2. The applicant for a permit must show that he has a specific job opportunity with a prospective employer at a designated place outside the relocation center and outside the Western Defense Command. If the applicant has dependents, he must state what arrangements will be made for the dependents who are to accompany him and for those who are to remain in the center. Preference will be given by the Director to applications for leave to accept employment within the Middle West.

3. The Project Director will promptly investigate as thoroughly as practicable each applicant who applies for a permit, through interviews with the applicant and those who know him or have information about him, and by other suitable means. The Project Director will then forward to the Regional Director the application and all related papers. * * *

4. The Regional Director, upon receipt of an application for a permit, will obtain from the Federal

Bureau of Investigation any information or record it can supply regarding the applicant or his family, and will make such further investigation in connection with the application as may be necessary. The Regional Director will then forward to the Director the application and all related papers, together with a full report of his findings and recommendations thereon.

5. Each application for a permit will be approved or disapproved by the Director. * * *

6. When the Project Director is advised of the approval of an application for a permit, he will issue a permit to the applicant. The permit will show * * * any special conditions upon which the permit is issued; will state that the permittee is required to notify the Director of the War Relocation Authority of any change of employer or change of address * * *

* * * * *

9. Every applicant issued a permit pursuant to this Instruction, and his accompanying dependents, will remain in the constructive custody of the military commander in whose jurisdiction lies the relocation center in which the applicant resides at the time the permit is issued. Any such permit may be revoked at any time upon the order of the Director, and the applicant and any dependents accompanying him may be required to return to the relocation center or such other place as the Director specifies, if the Director shall find such revocation to be necessary in the public interest.

10: This Instruction applies only to relocation centers which have been designated military areas pursuant to Executive Order No. 9066 of February 19, 1942.

/s/ D. S. Myer,
Director

Excerpts from War Relocation Authority's Administrative Instruction No. 22, Revised, issued November 6, 1942.

I. INTRODUCTION.

A. *Statement of Purpose.* The issuance of leave for departure from a relocation area is governed by the regulations issued by the Director on that subject, published in the Federal Register, September 29, 1942, title 32, c. 1, pt. 5. This Administrative Instruction is issued for the purpose of specifying in greater detail the procedure to be followed under those regulations. This Instruction does not alter the regulations. All administrative action with reference to leave shall be taken with due regard to both the regulations and this Instruction.

* * * * *

IV. INDEFINITE LEAVE.

A. *Execution of Application.* Unless an applicant for an indefinite leave has already executed Form WRA-126, for leave clearance, he shall be required to execute that form in duplicate in connection with his application for indefinite leave. * * *

* * * * *

D. *Transmission of Application to Director.* When the Project Director is satisfied that the file of the case contains all the relevant information more acces-

sible from the project than from Washington, he shall transmit to the Director the application for indefinite leave, Form WRA-130, and the project investigation record. * * *

E. Director's Investigation and Ruling. The Director, upon receipt of such file from the Project Director or the employment investigator, will investigate the applicant's prospective employment or other means of support and the conditions and factors affecting the applicant's proposed residence. If the applicant has not previously obtained leave clearance, the Director will conduct the further investigation described in Section V, Paragraph G of this Instruction. Where a considerable time has elapsed since the applicant secured a leave clearance, the Director will take such measures as he deems appropriate to bring down-to-date the investigation pertinent thereto. * * *

V. LEAVE CLEARANCE.

A. Application An application for leave clearance * * * must be filed, either before or simultaneously with, an application for indefinite leave or an application for leave to participate in a work group. Any evacuee wishing to obtain leave clearance and have his references checked, so that a subsequent application for leave of any type may be expeditiously processed, may file an application for leave clearance. * * *

B. Examination of Applicant. Upon the execution of the application for leave clearance, Form WRA-126, the Project Director shall interview the

applicant, shall elicit any information necessary to check or to complete the answers, and shall complete and correct the answers accordingly. He shall pursue any further line of questions that seem pertinent if he has any doubt concerning the frankness of the intentions of the applicant. Any further pertinent information elicited suitable for certification by the applicant's signature shall be written on to the form or stapled thereto. If sheets in addition to the printed form are used, the applicant shall be asked to sign those sheets separately. Separate applications shall be filed and fully processed for applicant's wife and for each dependent 17 years of age or over whom it is proposed to have accompany the applicant.

C. Investigation on Project. The Project Director shall make such further investigation as may be practical to verify and supplement at the project the information supplied by the applicant. This shall include a check with the Internal Security Officer of the project and may include interviews with any reference the applicant gives and interviews with persons with or for whom the applicant has worked, so far as any of such references or other people are on or accessible from the project for personal interviews. He shall send out to all other references given by the applicant a franked envelope addressed to the Director in Washington and a form letter, WRA-138, which requests a reply to be sent to the Director in Washington. He shall embody in a project investigation record any material information not certified by the applicant's signature.

D. Recommendations by Project Director. The Project Director shall then recommend the disposition to be made of the application for leave clearance—which may be either allowed, disallowed, or allowed with special conditions. Unless he deems the applicant entitled to clearance without doubt, he shall state reasons for the recommendation made. It will be recognized that in many instances these recommendations will be made upon only incomplete evidence, but they are to be recorded for consideration with such evidence as may be developed by subsequent investigation. These reasons may be stated briefly or at length, according to the circumstances, but in any case the significant facts shall be referred to and identified by their location on Form WRA-126 or by the page number of the project investigation record.

E. Investigation Outside Project. When the case suggests a need for further investigation concerning particular matters, such as addresses, ship manifests, or organizations, which cannot be investigated on the project, the project investigation record shall call particular attention to these matters and shall list them together with any available leads for further investigation.

F. Transmission of Papers. When the Project Director is satisfied that the file on the application contains all the relevant information more accessible from the project than from Washington, he shall transmit the Individual Record, Form WRA-26, in quadruplicate, and one copy of the application for leave clearance, the project investigation record, and

his findings and recommendations, to the Director. He shall retain a copy of these papers. At the same time, he shall send the Regional Director a copy of applicant's Form WRA-26 and a statement of the recommendation made by him. When an applicant is likely to be accompanied by members of his family or other dependents 17 years of age or older, a full set of such papers shall be transmitted for each such family member or dependent. Forms WRA-26 for children under seventeen should accompany Form WRA-126, whenever possible. If they do not accompany Form WRA-126 they shall be transmitted along with an application for indefinite leave as specified in Section IV, Paragraph D. :

G. *Director's Investigation and Ruling.* The Director, upon receipt of such file from the Project Director or employment investigator, will secure from the Department of Justice such information as may be obtainable, will examine any letters received from applicant's references, and will take such steps as may be necessary to satisfy himself concerning the probable effect upon the war program and upon the public peace and security of issuing indefinite leave to applicant. The Director will thereupon instruct the Project Director whether applicant is eligible to be entered upon the register of those cleared for indefinite leave; and whether any special conditions are to attach to any leave issued pursuant to such clearance, and will inform the Regional Director of such instructions in each case. The Director will further advise the Project Director of the reasons for denying

such clearance or for directing that such conditions attach to any leave issued pursuant thereto. He will assign such reason or reasons in the language of paragraph 5.3 (f) of the leave regulations.

Excerpts from War Relocation Authority's Handbook on Issuance of Leave for Departure from a Relocation Center issued July 20, 1943.

60.1 The issuance of leave for departure from a relocation area is governed by the regulations issued by the Director on that subject, published in the Federal Register, September 29, 1942, title 32, c. 1, pt. 5, as amended. This Handbook is issued for the purpose of specifying in greater detail the procedure to be followed under those regulations. This Handbook does not alter the regulations. All administrative action with reference to leave shall be taken with due regard to both the regulations and this Handbook.

Statement
of Purpose

60.4.3 In cases where the applicant meets the following eligibility requirements:

A. He has previously received leave clearance pursuant to an application filed either on DSS Form 304A and Form WRA-126a, or on Form WRA-126, Revised (notice of such leave clearance will be given on Forms WRA 258, 258a, and 258b), and the Project Director believes there is no need for the Director to bring the leave clearance investigation down to date.

The Project Director, without further authority from the Director, may issue the leave on the appro-

appropriate form (WRA-137, WRA-137a, or WRA-138) under any one of the following circumstances:

C. The applicant proposes to accept an employment offer or offer of support that has been referred to the Project Director by a Relocation Officer, or that has been investigated and approved by a Relocation Officer at the request of the Project Director.

D. The applicant does not intend to work, but has adequate financial resources to take care of himself, and a Relocation Officer has investigated and approved public sentiment at his proposed destination.

E. The applicant has made arrangements to live at a hotel or in a private home approved by a Relocation Officer while arranging for employment.

F. The applicant proposes to go to a given area pursuant to a notice from the Relocation Officer to the Project Director to the effect that the Relocation Officer can place a certain number of evacuees in a given area within a given time. This notice will describe the types of jobs that are available, including all pertinent information relating to wages, housing, cost of living, and community relations affecting evacuees. Relocation Officers shall take care not to encourage several projects to send competing groups for the same positions and it shall be the duty of Project Directors to notify the Relocation Officer of any and all leaves contemplated in response to such a notice of vacancies, in order that the Relocation Officer may keep the supply adjusted to the demand for evacuees.

* * * * *

H. The applicant proposes to accept an employment offer by a Federal, State, or local governmental agency.

I. The applicant proposes to attend a college, university, or professional school on the approved list, has evidence (obtained through the National Student Relocation Council or otherwise) that he has been admitted to the school, and has sufficient funds or a reasonably certain opportunity for part time employment to enable him to finish one quarter or semester of work. Leave may be granted under this subparagraph only if the applicant has received leave clearance pursuant to a notice from the Director on Form WRA-258a or 258b indicating that the application has been considered by the Japanese-American Joint Board in the Provost Marshal General's Department.

* * * * *

J. The applicant is a parent going to live with a son or daughter.

K. The applicant is a son or daughter going to live with one or both parents.

L. The applicant is a wife going to live with her husband, or is a husband going to live with his wife.

M. The applicant is going to live with a brother or sister.

N. The applicant is a dependent going to live with a person who will support him.

O. The applicant proposes to marry a person living outside a Relocation Center and live with him or her, as the case may be.

P. The applicant is away from the project on seasonal work leave and has been recommended by the appropriate Relocation Officer for indefinite leave (see Section 60.7.3). It is not necessary for the applicant to show that he has made arrangements for employment at his destination.

No leave shall be issued under the provisions of this paragraph to an applicant whose proposed place of residence or employment is within the Eastern Defense Command unless leave clearance has been approved by the Director on Forms WRA-258a or WRA-258b, or unless the notice of leave clearance specifically authorizes entry into the Eastern Defense Command.

No conditions shall be attached to the leave so issued unless they have previously been approved by the Director. When issuing the indefinite leave under Paragraphs G through N above, it shall be the responsibility of the Project Director to determine that the applicant has employment or other means of support at his destination, and the applicant should be informed that no check has been made of local sentiment at his destination. If the applicant wants such check to be made, the Project Director shall ask the appropriate Relocation Officer to make it. When an indefinite leave is issued under this paragraph, the Project Director shall immediately send to the Director in accordance with Section 60.4.5 of this Handbook, a copy of Form WRA-130 completely filled out, with the notation: Indefinite leave has been issued under Section 60.4.3, Paragraph of the Adminis-

trative Handbook on Issuance of Leave." If the Director should subsequently deny an application for leave clearance by an applicant who has been granted indefinite leave under the provisions of this paragraph, appropriate instructions with respect to the indefinite leave will be issued to the Project Director. If the Project Director should receive a notice that leave clearance has been denied without such instructions, he shall request them by wire.

* * * * *

60.5. Whether or not a case is within the special provisions of Section 60.4.3 or 60.4.4, the Project Director, when satisfied that the file of the case contains all the relevant information more accessible from the project than from Washington, shall transmit to the Director the application for indefinite leave, Form WRA-130, and the project investigation record. He shall also comply with the provisions of Section 60.6 of this Handbook with reference to any accompanying application for leave clearance. * * *

Transmission
of Application
to Director

60.6. Upon receipt of such file from the Project Director, the Director will take such further steps as may be required to review the action of the Project Director or to make his own ruling. If the Project Director has not granted indefinite leave, the Director will investigate the applicant's prospective employment or other means of support and the conditions and factors affecting the applicant's proposed residence. If the applicant has not previously obtained leave clearance, the Director will conduct the further investigation described in Section 60.6.6 of this Hand-

Director's
Investigation
and Ruling

book. Where a considerable time has elapsed since the applicant secured a leave clearance, the Director will take such measures as he deems appropriate to bring down-to-date the investigation pertinent thereto. Upon completing the investigation appropriate in any case where leave has not been granted by the Project Director, the Director will instruct the Project Director to issue or to deny indefinite leave, or to issue such leave on special conditions.

* * *

* * *
60.6.1. Every evacuee who has reached or who hereafter reaches his seventeenth birthday shall file an application for leave clearance. Application for leave clearance must accompany or precede an application for short term, seasonal work, or indefinite leave. * * *

2. The Project Director shall make such investigation as may be practical to verify and supplement at the project the information supplied by the applicant. This shall include a check with the Internal Security Officer of the project and may include interviews with any reference the applicant gives and interviews with persons with or for whom the applicant has worked, so far as any of such references or other people are on or accessible from the project for personal interviews. He shall embody in a project investigation record any material information not certified by the applicant's signature. He shall send out to all other references given by the applicant a franked envelope addressed to the Director in Wash-

ington and a form letter, WRA-140, which requests a reply to be sent to the Director in Washington. * * *

3. The Project Director shall then recommend the disposition to be made of the application for leave clearance—which may be either allowed, disallowed, or allowed with special conditions. Unless he deems the applicant entitled to clearance without doubt, he shall state reasons for the recommendation made. * * *

4. When the case suggests a need for further investigation concerning particular matters, such as addresses, ship manifests, or organizations, which cannot be investigated on the project, the project investigation record shall call particular attention to these matters and shall list them together with any available leads for further investigation.

5. When the Project Director is satisfied that the file on the application contains all the relevant information more accessible from the project than from Washington, he shall transmit to the Director five copies of the Individual Record, Form WRA-26, three copies of the application for leave clearance, Form WRA-126, Revised, and one copy of the project investigation record and his findings and recommendations. * * *

6. * * * Upon receipt of such forms or upon receipt of the papers transmitted from the projects pursuant to this Section 60.6.5, the Director will obtain from the Department of Justice such information as may be obtainable, will examine any letters received from applicant's references, and will take such steps as may be necessary to satisfy himself concerning the

probable effect upon the war program and upon the public peace and security of issuing indefinite leave to applicant. He will thereupon instruct the Project Director whether applicant is eligible for indefinite leave for the purpose of employment or residence anywhere in the United States except prohibited military areas, whether any subsequent application for indefinite leave involving residence or employment in the Eastern Defense Command must be submitted to the Director, whether the Provost Marshal General's Department has determined that the applicant is eligible for employment in plants and facilities vital to the war program, and whether any special conditions are to attach to any leave issued pursuant to such clearance. Forms WRA-258, 258a, and 258b will be used for this purpose. * * *

7. The Project Director will enter these instructions in the applicant's leave file and make suitable entry upon the register of those eligible for indefinite leave. He shall also notify the applicant on Form WRA-131, Revised, of the disposition of this application for leave clearance. * * *

60.10.1: This section supplements Section 60.6.6 of this Handbook by prescribing procedures to be followed in the case of applications for leave clearance that present difficult problems of clearance because the files do not clearly indicate eligibility for indefinite leave.

2. In each case in which the Director determines that the facts submitted do not clearly indicate the applicant's eligibility for leave clearance, the file or

suitable parts thereof, including the application and all information available to the Director about the applicant, will be returned to the center at which the applicant then resides, or last resided, for further investigation. Some files will be completely analyzed before they are returned and the analysis will indicate the factors requiring further investigation. This procedure will usually be followed when the file contains a derogatory intelligence report. Most other files, however, will be returned under Form WRA-261 without a complete analysis. For example, this action will be taken in cases where the Joint Board does not recommend, or is not expected to recommend, that leave clearance be granted; the files will be returned without complete analysis in order to expedite further consideration by the Project Director. Such files must be examined at the project in order to determine which of the factors listed below are present. All of the factors that occur in a particular file must be adequately covered by the further investigation provided for in Section 60.10.5-C, because each of them throws some doubt on eligibility for leave clearance. Any one of the first nine factors listed below (A through I) is regarded by intelligence agencies as sufficient to warrant a recommendation that leave clearance be denied unless there is an adequate explanation. One function of the investigation is to determine whether an adequate explanation exists. Particular care must be taken to cover these factors thoroughly in the investigation. The remaining factors are of lesser importance but must also be covered by the investigation, since in combination

they may present a case in which leave clearance should be denied. The factors are listed as follows:

A. A negative answer to question 28 of the application whether or not subsequently changed either during or after the registration.

B. Failure to answer question 28.

C. A late registration during the special registration in February and March.

D. A request for repatriation or expatriation whether or not subsequently retracted.

E. Military training in Japan. (It is assumed that men have received military training—Gunji Kyoren—if they received any of their education in Japan after the age of 15 and returned to the United States after 1930.)

F. Employment on Japanese naval vessels.

G. Three trips to Japan after the age of six, except in the case of seamen whose trips were confined to ports of call.

H. Ten years residence in Japan by a male citizen of the United States after the age of six, unless he is married to a citizen of the United States and has children.

I. An officer, organizer, agent, member, or contributor to any of the organizations on list "A", which intelligence agencies consider to be organizations known to be subversive. This list will be furnished in a restricted memorandum.

J. An officer, organizer, agent, member or contributor to any of the organizations on list "B".

which intelligence agencies consider potentially or mildly subversive. This list will also be furnished in a restricted memorandum.

K. A qualified answer to question 28 that raises a substantial doubt about loyalty.

L. Attendance at Japanese language school beyond high school age, which is assumed for this purpose to be 14.

M. Trips to Japan (the trips are regarded as most significant if made for a Japanese firm).

N. Residence in Japan.

O. Education in Japan.

P. Marriage to a Japanese alien in the case of American citizens.

Q. Employment by a Japanese governmental agency or a semi-official company.

R. Employment by any of the business enterprises on list "C", which intelligence agencies say have had at least semi-official connections with the Japanese government or have engaged in subversive activities in the United States. This list will be furnished in a restricted memorandum.

S. Employment as a Japanese language school instructor.

T. Shinto religion.

U. Investments in Japan.

V. An answer to question 27 on the application qualified to indicate an unwillingness to fight in the Pacific.

W. Misrepresentations of fact when filling in application.

X. A bad project record.

Y. Derogatory intelligence report about the individual.

Z. Derogatory intelligence report about close relatives.

AA. Close relatives are interned or paroled.

BB. Close relatives are members of organizations listed above in paragraph "I".

CC. Close relatives, particularly males, are living in Japan (not much significance is attached to married females living in Japan).

DD. Close relatives have asked for repatriation.

EE. Close relatives have answered question 28 in the negative.

FF. Close relatives who are citizens of the United States have lived in Japan for extended periods of time or have received most of their education in Japan.

GG. Close relatives have investments in Japan.

60.13.1. It is the policy of the War Relocation Authority to assist evacuees to whom indefinite leave has been granted (except when the leave is primarily for the purpose of attending a college or university) in meeting costs of transportation and initial subsistence expenses where this is necessary in order to enable any evacuee to establish himself and his family

in the community to which he is going. Assistance will be given only once and will ordinarily be given only when indefinite leave is first issued. An evacuee who has been granted indefinite leave without receiving assistance, and who then returns to the center and leaves a second time will be given no assistance when he leaves the second time, unless his return to the center was on the recommendation of a Relocation Officer, and the Project Director in the exercise of his discretion concludes that by reason of special circumstances a leave assistance grant is proper.

2. * * * The *maximum of assistance* will be coach fare for each member of the family, plus \$3.00 per person per day of travel for meals en route, plus five dollars per day for five days (\$25.00) for each member of the family, the latter sum being designed to meet initial subsistence expenses at the place of destination. This maximum of assistance shall be given in all cases in which the family's resources in cash amount to \$100 per family member, or less. * * *

Amount
Assistance

Oct 8 1944

CHARLES ELMER DROPLEY
CLERK

No. 70

In the Supreme Court of the United States

OCTOBER TERM, 1944

IN THE MATTER OF THE APPLICATION OF MITSUYE
ENDO FOR A WRIT OF HABEAS CORPUS

/ MITSUYE ENDO

MILTON EISENHOWER, DIRECTOR OF WAR RELOCATION
AUTHORITY AND WARTIME CIVILIAN CONTROL AD-
MINISTRATION

UPON CERTIFICATE AND THE RECORD FROM THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 70

IN THE MATTER OF THE APPLICATION OF MITSUYE
ENDO FOR A WRIT OF HABEAS CORPUS

MITSUYE ENDO

v.

MILTON EISENHOWER, DIRECTOR OF WAR RELOCATION
AUTHORITY AND WARTIME CIVILIAN CONTROL AD-
MINISTRATION.*

UPON CERTIFICATE AND THE RECORD FROM THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The memorandum opinion of the District Court for the Northern District of California, Southern Division (R. 15-16) is not reported. The Cir-

*In order to avoid confusion, the Government is printing on this brief both the title of this case erroneously assigned in the United States Circuit Court of Appeals for the Ninth Circuit and the correct title. Since no respondent was ever served or ever appeared in the District Court, the case is here

cuit Court of Appeals for the Ninth Circuit certified questions, which are not presented in the transcript of record, and did not file an opinion.

JURISDICTION

The certificate of questions of law upon which the Circuit Court of Appeals desired instruction was filed on April 22, 1944. On May 8, 1944, this Court ordered that the entire record be certified up so that the whole matter in controversy might be considered (R. 23). The jurisdiction of this Court rests on Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The appellant in the court below, an American citizen of Japanese ancestry, while detained in the Tule Lake Relocation Center operated by the War Relocation Authority at Newell, California, in the Northern District of California, on July

as an ex parte proceeding and is properly entitled "In the Matter of the Application of Mitsuye Endo for a Writ of Habeas Corpus." Cf. *Ex parte Milligan*, 4 Wall. 2, 113. The United States Attorney filed a brief in the District Court in which he argued that the petition, together with matters of which that court might take judicial notice, showed that, as a matter of law, petitioner was not entitled to the writ. The United States Attorney, however, was not appearing for any individual respondents but was representing the Government. This practice was expressly approved in the *Milligan* case, 4 Wall. 114. The title *Endo v. Eisenhower* was presumably assigned when the record on appeal in the Ninth Circuit was prepared for printing.

Hereinafter designated as appellant.

13, 1942, filed a petition for a writ of habeas corpus in the District Court for that District (R. 2-10). It is conceded, although the fact does not appear of record, that while the petition was pending, the appellant applied for and received "leave clearance" from the W. R. A. which, under W. R. A. regulations applicable to her, satisfied one of the requirements for leave to depart from the Relocation Center. The petition for a writ of habeas corpus was denied on July 2, 1943 (R. 15-16). An appeal from the District Court's judgment was filed (R. 17) and thereafter, on September 22, 1943, appellant was transferred from the Tule Lake Relocation Center to the Central Utah Relocation Center at Topaz, Utah, where she now is. Although appellant has obtained "leave clearance" and may receive a permit for "indefinite leave" from the Relocation Center upon satisfying certain conditions prescribed by W. R. A. regulations (*infra*, pp. 121-131), relating chiefly to her means of support and to the acceptability of persons of Japanese ancestry in a community to which she proposes to go, none of which are shown to be absent in her case, appellant refuses to apply for such a permit (R. 11-15).

The principal questions are:

1. Whether authority has been conferred by the Congress or the President to enforce the regulations which provide for the detention of the appellant under the circumstances presented.

2. If so, whether the regulations as applied are constitutional.

The following subsidiary questions are discussed:

1. Whether the removal of the appellant from the Relocation Center in the district in which the habeas corpus proceeding was commenced to a Relocation Center outside of the district and outside of the circuit, after an appeal had been taken to the Circuit Court of Appeals, renders this proceeding moot by removing the basis of jurisdiction.

2. Whether the legality of the appellant's custody can be determined on the present record, or requires that the cause be remanded for the filing of a return and the trial of any issues of fact presented by the pleadings.

3. Whether the appellant's failure to exhaust the administrative remedy of applying for leave under the W. R. A. regulations deprives her of the right to obtain an adjudication in this habeas corpus proceeding.

4. Whether the validity of the continued exclusion of appellant and other persons of Japanese ancestry from the West Coast area is involved in this case.

STATUTES, PROCLAMATIONS, ORDERS, AND REGULATIONS INVOLVED

The statutes and other official texts involved in the case are printed in the appendices. The more important provisions are summarized in the statement of the case.

STATEMENT

The relevant contents of the record, of pertinent official documents, and of the records of the War Relocation Authority, together with facts which are of general knowledge underlying the program of the Authority and the detention of the appellant, may be summarized as follows:

A. Facts Relating to the Appellant.—The petition for a writ of habeas corpus alleges in substance as follows. The appellant is a native born citizen of the United States, born on May 10, 1920, at Sacramento, California. She is a loyal citizen and owes allegiance to and is a citizen of no other country (R. 20). At the time of the petition she was confined in a camp under armed guard against her will, allegedly by the Director of the War Relocation Authority in accordance with orders of the Commanding General of the Western Defense Command and other officials (R. 3-4). The petition alleged as the sole reason for the appellant's detention that she was of Japanese ancestry; that no warrant or process existed to justify her arrest and imprisonment; that no charge had ever been made against her and she had never been informed of any other reason for which she was being held and no hearings had been granted to her (R. 4-5). The appellant has never been a member of the military forces of the United States and is not subject to military law. Martial law had not been declared and all courts in and of the State of California were available to any party

charging the appellant with crime or wrongdoing (R. 5).

The petition further alleges that the appellant, after investigation of her qualifications, efficiency, fitness and moral responsibility by officials of the State of California, became a permanent civil service employee of that State. She retained her position until April 7, 1942; when the Personnel Board of the State suspended her and gave as one of the reasons for this action that she was subject to being evacuated and consequently would be unable to perform the duties of her position. Thereafter, the Personnel Board filed supplementary charges against the appellant, stating that she had been evacuated and was confined and detained and was unavailable to perform her duties as a civil service employee. Unless the appellant is able to establish that she is not subject to detention her Civil Service standing will be imperiled (R. 5-6).

The petition prays for a writ of habeas corpus directed to the military and W. R. A. authorities in charge of the exclusion and relocation programs and that she be discharged and set at liberty.

No answer or other pleading was filed in response to the petition; but the Government, through the United States Attorney, filed a brief urging that the petition on its face, together with the military and other published regulations which were a matter of judicial notice, showed that the detention

was lawful and that the petition should be dismissed.

Thereafter, an affidavit of Elmer L. Shirrell, Project Director of the Tule Lake War Relocation Center, sworn to on November 23, 1942, was filed in the District Court on January 7, 1943. It recited that the appellant was removed to the Tule Lake War Relocation Center pursuant to the authority of Executive Order No. 9066 of February 19, 1942, and of a Public Proclamation of the Commanding General of the Western Defense Command and Fourth Army, promulgated pursuant to that Executive Order; that the Director of the War Relocation Authority had issued regulations providing that persons residing in Relocation Centers might apply for leave to depart from the Centers; that these regulations had been published in the Federal Register and in a newspaper published at the Tule Lake Center and were a matter of common knowledge among the residents of the Center, but that the petitioner had made no application for permission to leave the Relocation Center (R. 11-13).

An affidavit of James C. Purcell, attorney for the appellant, sworn to on January 31, 1943, and filed in the District Court on February 19, 1943, stated that the regulations made no provision for the return of the appellant to her place of residence in Sacramento, California, where she had been employed; that application to return to Sacramento would be useless; and that the petitioner

was confined and detained against her will and continued to be refused the right to return to her previous place of residence and employment (R. 14-15).

The order of the District Court, dated and filed on July 2^d 1943, stated that "It appearing upon the face of the petition that petitioner is not entitled to a writ of habeas corpus, and it further appearing that she has not exhausted her administrative remedies under the provisions of Executive Order No. 9102 (7 E. R. 2165) and the regulations promulgated thereunder," it is therefore ordered that the petition be denied. (R. 15-16.)

The records of the War Relocation Authority disclose that on February 19, 1943, the appellant applied for "leave clearance" under the W. R. A. regulations (*infra*, pp. 126-127). Thereafter she received a Notice of Action on Application for Leave Clearance, dated August 23, 1943, which advised her that she was "eligible for indefinite leave for the purpose of employment or residence in the Eastern Defense Command, as well as in other areas," but that the notice did not authorize her departure from the Relocation Center and that a separate application must be made for such authorization and might be made at any time she wished (*infra*, pp. 153-154).

The notice of appeal from the order denying the petition for a writ of habeas corpus, dated August 16, 1943, was filed in the District Court on August 26, 1943 (R. 16-17). On September 22, 1943, ac-

according to the records of the War Relocation Authority, the appellant was transferred from the Tule Lake Relocation Center to the Central Utah Relocation Center in the District of Utah where she remains.

B. *The Military Regulations.*—The important statutes, Executive Orders, proclamations and regulations involved and referred to in the courts below, may be summarized as follows:

The Joint Resolution of Congress of December 8, 1941 (*infra*, p. 86) declared a state of war to exist with the Empire of Japan, authorized and directed the President to employ the entire naval and military forces and the resources of the Government to carry on the war, and pledged all of the resources of the country to bring the conflict to a successful termination.

On December 11, 1941,² the eight western States and the Territory of Alaska were activated by the War Department as the Western Defense Command and designated as a "theater of operations". An area approximately 100 miles wide extending from the Canadian border along the Pacific Coast to the California-Mexican border was declared to be a "combat zone."³

² General DeWitt's Public Proclamation No. 1 of March 2, 1942 (*infra*, pp. 97-101); General Order No. 1, December 11, 1941. See record in *Yasui v. United States*, 320 U. S. 115.

³ "The *theater of war* comprises those areas of land, sea, and air which are, or may become, directly involved in the conduct of war.

"A *theater of operations* is an area of the theater of war necessary for military operation and the administration and

Executive Order No. 9066 of February 19, 1942 (*infra*, pp. 90-92) recites that the successful prosecution of the war requires every protection against espionage and sabotage to national defense material, premises, and utilities and authorizes the Secretary of War and military commanders designated by him whenever such action is deemed necessary—

* * * to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion * * *

Pursuant to his designation as Military Commander under the Executive Order by the Secretary of War, the Commanding General of the Western Defense Command and Fourth Army in supply incident to military operation. The War Department designates one or more theaters of operation.

"A *combat zone* comprises that part of a theater of operations required for the active operations of the combatant forces fighting" (Field Service Regulations—Operations, War Department, May 22, 1941, Field Manual 100-5, pars. 1, 2, and 3).

⁴ Letter to General DeWitt from Secretary Stimson, dated February 20, 1942, reproduced in *Final Report, Japanese Evacuation from the West Coast (1942)*, hereinafter cited as *Final Report*, at p. 25.

his Public Proclamation No. 1 of March 2, 1942 (*infra*, pp. 97-101), declared the Pacific Coast area of the United States, because of its geographical location, to be particularly subject to attempted invasion and in connection therewith subject to espionage and sabotage, and designated certain "military areas" and "military zones" and declared that persons or classes of persons, as the situation might require, would by subsequent proclamation be excluded from certain of these areas. Public Proclamation No. 2 of March 16, 1942 (*infra*, pp. 101-105) designated further military areas and military zones from which persons might subsequently be excluded.

Executive Order No. 9102 of March 18, 1942 (*infra*, pp. 92-96), established the War Relocation Authority in the Office for Emergency Management in the Executive Office of the President, and authorized the Director of the War Relocation Authority to formulate and effectuate a program for the removal, relocation, maintenance, and supervision of persons or classes of persons designated pursuant to Executive Order No. 9066 for removal from the areas prescribed under that Order. The Director was authorized to prescribe regulations necessary or desirable to promote effective execution of the program.

The Act of March 21, 1942 (*infra*, pp. 86-87), provides that whoever shall enter, remain in, leave,

or commit any act in, any military area or zone prescribed under the authority of an Executive Order of the President by the Secretary of War or a military commander designated by him, contrary to the restrictions applicable to any such area or zone, or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the restrictions and order and his act was in violation thereof, be guilty of a misdemeanor.

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Public Proclamations Nos. 4 and 6 of March 27, 1942 and June 2, 1942, in terms prohibited all alien Japanese and persons of Japanese ancestry from departing voluntarily from Military Areas Nos. 1 and 2, respectively, until further order, and stated that restriction and regulation of the migration of such persons was necessary in order to provide for their welfare and insure their orderly evacuation and resettlement.

Each one of a series of 108 Civilian Exclusion Orders issued by General DeWitt pursuant to Public Proclamations Nos. 1 and 2 from March 24 to July 22, 1942, ordered the exclusion of persons of Japanese ancestry from a particular described portion of the prohibited military areas on or before the particular date set forth in each order and by the method prescribed in the order and made it an offense under the Act of March 21, 1942, for such a person to be found there after the date specified. The Civilian Exclusion Orders

accomplished the exclusion of persons of Japanese ancestry from the State of California and from the western portions of Washington and Oregon and the southern part of Arizona,⁵ except as they were confined in Assembly Centers or Relocation Centers to which they were removed. The several Civilian Exclusion Orders were supplemented by general provisions for exclusion from Military Areas Nos. 1 and 2, respectively, in Public Proclamations Nos. 7 and 11 of June 8, 1942, and August 18, 1942 (*infra*, pp. 106-109).

The appellant's exclusion was effected by Civilian Exclusion Order No. 52, dated May 7, 1942 (*infra*, pp. 117-120), which ordered that from and after May 16, 1942, all persons of Japanese ancestry be excluded from that portion of Military Area No. 1 described as "all of the City of Sacramento, State of California." The order directed a responsible member of each family and each individual living alone to report on May 8, 9, or 10 to a Civil Control Station in Sacramento. The Civil Control Station was equipped to assist the Japanese population in making arrangements for evacuation. On May 15, 1942; the appellant was evacuated to the Sacramento Assembly Center, a few miles northwest of the City of Sacramento.

⁵ The exclusion orders were published at intervals in the Federal Register. Orders Nos. 1 to 99 were ratified by General DeWitt's Public Proclamation No. 7 of June 8, 1942 (7 F. R. 4498), and Orders Nos. 100 to 108 were ratified by Proclamation No. 11 of August 18, 1942 (7 F. R. 6703).

General DeWitt's Civilian Restrictive Order No. 1 of May 19, 1942 (*infra*, pp. 115-116) prohibited evacuees from leaving Assembly or Relocation Centers except pursuant to authorization obtained from his headquarters.

On June 19, 1942, the appellant was transferred from the Sacramento Assembly Center to the Tule Lake Relocation Center in Modoc County in the northeast corner of California. General DeWitt's Public Proclamation No. 8 of June 27, 1942 (*infra*, pp. 109-111), designated all Relocation Centers then or thereafter established within the Western Defense Command as War Relocation Project Areas* and imposed the same restrictions as were imposed by the order of May 19, 1942. By letter of August 11, 1942, General DeWitt authorized the War Relocation Authority to issue permits for persons to leave these Areas.

The Secretary of War's Public Proclamation No. W. D. 1 of August 13, 1942, designated each Relocation Center outside of the Western Defense Command as a military area and prohibited the

* The six War Relocation Centers and Project Areas established within the Western Defense Command are: Central Utah Relocation Center, Topaz, Utah; Colorado River Relocation Center, Poston, Arizona; Gila River Relocation Center, Rivers, Arizona; Manzanar Relocation Center, Manzanar, California; Minidoka Relocation Center, Hunt, Idaho; Tule Lake Relocation Center, Newall, California, now known as Tule Lake Center.

Four War Relocation Centers and Project Areas were established outside the Western Defense Command: Granada Relocation Center, Amache, Colorado; Heart Moun-

egress of persons of Japanese ancestry residing in such areas without permission from the Secretary of War or from the Director of the War Relocation Authority (*infra*, pp. 112-114). Violations of these restrictions were punishable as criminal offenses under the Act of March 21, 1942.

On February 16, 1944, Executive Order No. 9423, 9 F. R. 1903, transferred the War Relocation Authority from the Office for Emergency Management of the Executive Office of the President to the Department of the Interior, to be administered as an organizational entity within the Department. Its functions were transferred to the Secretary of the Interior to be exercised through the officers, agents, and employees of the War Relocation Authority. By his Administrative Order No. 1922 of February 16, 1944 the Secretary of the Interior authorized the Director of the War Relocation Authority, under the supervision and direction of the Secretary, "to perform the functions transferred to the Secretary of the Interior in Executive Order No. 9423 * * * until further orders * * *"

C. War Relocation Authority Leave Procedures.—Pursuant to the authority to make regulations conferred by Executive Order No. 9102 (*infra*, pp. 92-96), and the delegation of authority

tain Relocation Center, Heart Mountain, Wyoming; Jerome Relocation Center, Denson, Arkansas; Rohwer Relocation Center, McGehee, Arkansas. The progress of relocation has permitted W. R. A. to close the Jerome Center. .

to permit evacuees to leave Relocation Centers contained in the Secretary of War's Proclamation W. D. 1 of August 13, 1942, and in General DeWitt's letter of August 11, 1942, the Director of the War Relocation Authority has issued administrative instructions and regulations which establish a system for obtaining leave, applicable to the appellant, the development of which may be summarized as follows:

1. *Administrative Instruction No. 22.*—This Administrative instruction, which was issued July 20, 1942 (*infra*, pp. 132-134), provided that, with exceptions not here relevant, any person could apply for a permit to leave a Relocation Center if he could show that he had a specific job opportunity with a prospective employer at a designated place outside the Relocation Center and outside the Western Defense Command. The Administrative Instruction further provided for an investigation of each applicant for leave and provided that any permit for leave could be revoked if the Director of the War Relocation Authority found that such revocation was necessary in the public interest.

2. *W. R. A. Regulations of September 26, 1942.*—These regulations (*infra*, pp. 121-125; 7 F. R. 7656) provided more complete and detailed procedures for issuing leave. In addition to establishing a leave system for persons who desired to leave a Relocation Center for only a specific period, they provided for the issuance of "in-

definite leave." A permit for indefinite leave places no time limit on the permittee's residence outside of the Center and may provide for "travel unlimited except as to restrictions imposed by military authorities with reference to military areas or zones * * *" (Sec. 5.8 (b)). An application for indefinite leave is to be granted when the Director is satisfied that the applicant will have employment or other means of support and can successfully maintain residence at his proposed destination and that the issuance of leave in the particular case will not interfere with the war program or otherwise endanger the public peace and security. (Sec. 5.3 (e), (f)); provided the applicant agrees to report his arrival at the proposed destination and any subsequent changes of employer or of address. See par. 6 of Administrative Instruction No. 22; Sec. 5.5 (b) of Regulations; last paragraph of "Application for Indefinite Leave" at present in use, printed *infra*, pp. 154-155. The regulations provide that the Director may revoke any leave when conditions are so far changed or when such additional information has become available that an original application for leave would be denied. Sec. 5.9 (b). Upon the termination of any leave the applicant is to return to the Relocation Center in which he previously resided unless otherwise directed by the Director of the War Relocation Authority. Sec. 5.9 (c).

3. *Revised Administrative Instruction No. 22 of November 6, 1942.*—This revised Administrative

Instruction, issued for the purpose of specifying in greater detail the procedure to be followed under the regulations, divided the procedure for obtaining indefinite leave into two parts by providing that an Application for Leave Clearance must either accompany or precede an Application for Indefinite Leave (Secs. IV-A and V-A, *infra*, pp. 135-137). In considering an application for leave clearance the Director was to "take such steps as may be necessary to satisfy himself concerning the probable effect upon the war program and upon the public peace and security of issuing indefinite leave to applicant;" in this connection he was to consider all information obtainable about the applicant through an investigation at the Relocation Center and through information obtainable from the Department of Justice,* as well as through any other steps appearing to him to be necessary (Secs. V-G and V-C). Upon an application for leave by a person who had received leave clearance, the only investigation to be made was one into "the applicant's prospective employment or other means of support and the conditions and factors affecting the applicant's proposed residence," except in a case in which, because of a considerable lapse of time between the issuance of leave clearance and the application for leave, the Director might deem it necessary to bring the leave clear-

* The source in the Department of Justice for such information is specified in the Regulations as the Federal Bureau of Investigation. Regulations, Sec. 5.3 (b).

ance investigation down to date. Sec. IV-E. Thus, according to the procedure specified in the Revised Administrative Instruction, the evacuee's eligibility for indefinite leave from the standpoint of national security was to be determined pursuant to his application for leave clearance, and his eligibility as respects financial support and the suitability of his proposed place of residence was to be determined upon his application for indefinite leave.

4. *W. R. A. Handbook of July 20, 1943, on Issuance of Leave.*—The Handbook, (*infra*, pp. 139-152), supersedes the Revised Administrative Instruction as a supplement to the W. R. A. Regulations, and includes further details as to the Director's method of determining the applicant's eligibility for leave from a security standpoint in cooperation with other government agencies. Under Section 60.6.6 a determination is made, in connection with the leave clearance application, by the Provost Marshal General's office as to whether the applicant "is eligible for employment in plants and facilities vital to the war program," and under Section 60.10.2 a further investigation at the Center is prescribed when "the Joint Board"

* The Joint Board referred to is the Japanese American Joint Board established by the War Department on January 20, 1943, and composed of a representative from each of the following agencies: War Relocation Authority, Office of Naval Intelligence, Military Intelligence Service, and Provost Marshal General's Office. The Board undertook to consider the cases of all evacuee American citizens who were 17 years

does not recommend, or is not expected to recommend, that leave clearance be granted," or when the file with regard to the applicant for leave clearance "contains a derogatory intelligence report." Nine factors are specified which are "regarded by intelligence agencies as sufficient to warrant a recommendation that leave clearance be denied unless there is an adequate explanation."

The Handbook also states in greater detail the criteria to be used in determining whether an applicant for leave who has received leave clearance is eligible from the standpoint of financial support and probable community acceptance. Section 60.4.3 (*infra*, pp. 140-143) provides that an application for leave from such a person is to be granted (unless it is necessary for the leave clearance investigation to be brought down to date) under any one of 14 stated circumstances including the following: "The applicant proposes to accept an employment offer or offer of support that has been referred to the Project Director by a Relocation Officer, or that has been investigated and approved by a Relocation Officer at the request of the Project Director;" or "The applicant

or more of age and to make recommendations with regard to the granting of indefinite leave. The Board was abolished in May 1944. During its existence it reviewed nearly 37,000 cases. A statement with regard to the functions of the Board appears in Senate Document No. 96, *Segregation of Loyal and Disloyal Japanese in Relocation Centers*, 78th Cong., 1st Sess., at p. 18. Clearance of evacuees for war plant employment continues to be handled by the Provost Marshal General's Office.

does not intend to work, but has adequate financial resources to take care of himself and a Relocation Officer has investigated and approved public sentiment at his proposed destination" (Section 60.4.3 C, D).

5. *W. R. A. Revised Regulations of January 1, 1944*.—The Revised Regulations (*infra*, pp. 126-131; 9 F. R. 154) include the substance of the Regulations of September 26, 1942, and the major provisions of the leave clearance procedure which was adopted after the promulgation of the original Regulations. The Revised Regulations and the Handbook as amended provide the present procedures for obtaining indefinite leave.

6. *Appellant's Application for Leave Clearance*.—As previously stated (*supra*, p. 3), the appellant has not made an application for indefinite or other leave,¹⁰ but on February 19, 1943, after the petition herein was filed in the District Court on July 13, 1942, she applied for leave clearance, which was granted on August 16, 1943.¹¹

¹⁰ The District Court, in reaching its decision (R. 17), considered the appellant's administrative remedy of applying for leave although it came into existence after the filing of her petition. "The validity of a detention questioned by petition for *habeas corpus* is to be determined by the condition existing at the time of the final decision thereon." *Mensenich v. Tod*, 264 U. S. 134, 137. According to the same principle, this Court may take into account the further developments that have occurred since the District Court's decision.

¹¹ The fact that leave clearance has issued is undisputed. It narrows the issue in the case to one involving an individual who has satisfied security considerations but has not thereupon applied for leave.

The notice of this action which she received (*infra*, pp. 153-154)¹² stated that "You are eligible for indefinite leave for the purpose of employment or residence in the Eastern Defense Command as well as other areas; provided the provisions of Administrative Instruction No. 22, Rev., are otherwise complied with," but that "this notice does *not* authorize departure from the relocation center." A suitable application must be made separately at any time you wish to apply for leave".¹³

On September 22, 1943, after obtaining leave clearance and after filing her appeal from the denial of her petition for a writ of habeas corpus, appellant, as previously stated (*supra*, p. 3), was transferred from the Tule Lake Relocation Center to the Central Utah Relocation Center at Topaz, Utah; outside the circuit in which the cause was pending. This transfer was made in the course of the regular operations of the War Relocation Authority, in order to make the Tule Lake Relocation Center available for evacuees not found to be loyal (see *infra*, p. 32).

D. Development and Nature of the Relocation Program.—The situation leading to the determination of the military authorities to exclude all

¹² The official record of the action in respect to appellant's leave clearance is also printed *infra*, pp. 152-153.

¹³ The notice also stated that the Provost Marshal General's Department had determined that the appellant was not eligible for employment in plants and facilities vital to the war effort. This restriction is not relevant to the case at bar.

persons of Japanese ancestry from California and parts of Washington, Oregon, and Arizona, is reviewed in *Hirabayashi v. United States*, 320 U. S. 81. The exclusion procedure is set forth in the Government's brief in *Korematsu v. United States*, No. 22, this Term, to be argued with this case. The facts there set forth will for the most part not be repeated here,¹⁴ but attention will be centered principally upon the relocation program and the regulations applicable to persons¹⁵ in the situation of appellant.

The operations of the War Relocation Authority, including the leave procedures, have been considered by the Military Affairs and Appropriations Committees of the Senate and by the Select Committee Investigating National Defense Migration (Tolan Committee), the Special Committee on Un-American Activities (Dies Committee), and the Appropriations Committee of the House of Representatives.¹⁵

¹⁴ The Final Report of Lt. Gen. J. L. DeWitt, Commanding General, Western Defense Command, upon the Japanese Evacuation, 1942, hereinafter cited as *Final Report* (which is dated June 5, 1943, but which was not made public until January 1944) is referred to for statistics and other information concerning the actual evacuation and the events that took place immediately subsequent thereto in the Government's brief in the *Korematsu* case. See footnote 2, p. 31, of that brief.

¹⁵ The following are the principal documents which record the hearings and conclusions of the several committees:

Senate Committee on Military Affairs:

Report of the Sub-Committee on Japanese War Relocation Centers to the Committee on Military

A Message from the President and Statement of the Director of War Mobilization in response to Senate Resolution No. 166, 78th Congress, 1st

Affairs on S. 444 and S. Res. 109 and 111, 78th Cong., 1st sess. (May 1943).

Hearings before the Subcommittee on S. 444, 78th Cong., 1st sess., Parts 1-4 (Jan.-Nov. 1943).

Select Committee of the House of Representatives Investigating National Defense Migration:

Preliminary Report and Recommendations on Problems of Evacuation of Citizens and Aliens from Military Areas pursuant to H. Res. 113, H. R. Rep. No. 1911, 77th Cong., 2d sess. (March 1942), hereinafter cited as *Preliminary Report*. Fourth Interim Report, Findings and Recommendations, etc., H. R. Rep. No. 2124, 77th Cong., 2d sess. (May 1942), hereinafter cited as *Fourth Interim Report*.

Hearings before the Committee pursuant to H. Res. 113, 77th Cong., 2d sess., Parts 29-31: Problems of Evacuation of Enemy Aliens and Others from Prohibited Military Zones (Feb.-Mar. 1942).

Special Committee of the House of Representatives on Un-American Activities:

Report and Minority Views on Japanese War Relocation Centers, H. Rep. No. 717, 78th Cong., 1st sess. (Sept. 1943).

Hearings before the Committee on H. Res. 282, 78th Cong., 1st sess., vol. 46 (Nov.-Dec. 1943).

Committee on Appropriations, House of Representatives:

Hearings before the Subcommittee on the National War Agencies Appropriation Bill for 1944, pp. 694-780 (1943), hereinafter cited as 1944 Appropriation Hearings. *Idem.* for 1945, pp. 608-726 (1944), hereinafter cited as 1945 Appropriation Hearings.

session,¹⁶ contains a report upon some of the more prominent aspects of the relocation program.

1. *Origin and Principal Features of the Program.*—The program which the War Relocation Authority is engaged in carrying out has three main features: (1) the maintenance of Relocation Centers as interim places of residence for evacuees; (2) the segregation of loyal evacuees from those who could not be released without danger to the national security and the continued detention of the latter group; and (3) the relocation of the former group in communities so far as possible, by means of the Authority's leave procedures.

A program having these features did not develop immediately, but grew initially out of a decision which was made following a meeting of the Director of the Authority with Colonel Karl R. Bendetsen of the Western Defense Command and Governors representing the intermountain states, together with other state and Federal officials and representatives of agricultural interests, which was held in Salt Lake City on April 7, 1942.¹⁷ At the time of the meeting, the Commanding General of the Western Defense Command had determined upon a controlled evacuation of persons excluded

¹⁶ Senate Document No. 96, 78th Congress, 1st sess. hereinafter cited as S. Doc. No. 96.

¹⁷ S. Doc. No. 96, p. 4.

from the West Coast area, involving the use of Assembly Centers for the temporary detention of the evacuees. Public Proclamations Numbers 1, 2, and 4 (*infra*, pp. 97-106) and the initial Civilian Exclusion Orders, which set the evacuation in motion, had been issued. See the Government's brief in *Korematsu v. United States*, No. 22, this Term, pp. 64-67. Thus it had been decided that 110,219 persons of Japanese ancestry (*Korematsu* brief, p. 74) would be removed quickly from their homes, occupations, and accustomed surroundings in the West Coast Area, under control by the Government. The methods to be employed in providing for the evacuees after their detention in Assembly Centers remained to be determined.

Strong opposition was expressed by the Governors present at the meeting to any type of unsupervised relocation of the evacuees. This opposition was based upon the feeling in local communities that the evacuees should not be permitted to enter these communities and there be at large.¹⁸ Other manifestations of community hostility to the evacuees occurred.¹⁹

¹⁸ S. Doc. No. 96, p. 4. The views reflected at the meeting of Governors accorded with those previously expressed to the Tolan Committee, both by the Governors whose opinions it solicited, and by witnesses before the Committee. See *Preliminary Report*, pp. 27-30; *Fourth Interim Report*, p. 17; *Hearings before the Committee, 77th Cong., 2d sess., Part 29*, pp. 11137, 11156.

¹⁹ *Korematsu* brief, pp. 13-14.

Following the meeting, the War Relocation Authority abandoned plans for assisting groups of evacuees in private colonization and temporarily laid aside plans for aiding evacuees to obtain private employment.²⁰ Instead, the Authority concentrated upon the establishment of Relocation Centers with sufficient capacity to accommodate the entire evacuee population.²⁰ The considerations which led to the use of Relocation Centers were essentially the same as those which had previously caused the military authorities to abandon the plan of encouraging self-arranged migration by persons subject to exclusion from the West Coast area, which had been in effect during March 1942, and which continued with respect to Military Area No. 2 until June 2, 1942.²¹ In all, 4,889 persons left the military areas under their own arrangements.²² These persons have never been detained in Assembly or Relocation Centers.

The decision which was made with regard to the character of the relocation program was in accord with the judgment of the Tolan Committee. Reporting in May 1942, that Committee stated that "private employment [of the evacuees] would appear to be entirely impracticable for some time to come and should not be considered

²⁰ S. Doc. No. 96, p. 4.

²¹ *Korematsu* brief, pp. 62-63.

²² *Final Report*, p. 109.

in present plans as a solution to the resettlement problem." The Committee, however, favored "acceptance of the principle that resettlement shall be for purposes of insuring full preservation of citizenship rights and ultimate participation of the evacuees in normal and productive ways of living."²³

2. *Character of the Evacuee Population.*—The responsibility of the War Relocation Authority arose with respect to each group of evacuees as they were removed from Assembly Centers to Relocation Centers.²⁴ The entire population of which W. R. A. thus assumed charge between May and November 1942²⁵ consisted of three principal elements: (1) the older alien group, numbering approximately 40,000 individuals, who came to the United States largely between 1890 and 1924²⁶

²³ *Fourth Interim Report*, p. 18.

²⁴ For the agreement between the War Department and the War Relocation Authority, defining the functions of each in regard to the evacuees, see *Final Report*, p. 239. Actually, 108,503 persons were evacuated directly to Relocation Centers or transferred from Assembly Centers. Several hundred were released from Assembly Centers to perform agricultural labor or for other special reasons. *Final Report*, p. 279.

²⁵ For details as to the transfer operation see *Koremasu* brief, pp. 69-70.

²⁶ The Immigration Act of the latter year, 43 Stat. 161, 8 U. S. C. Sec. 213, excluded persons of the Mongolian race.

but who were barred from citizenship;²⁷ (2) approximately 25,000 younger adults, composed principally of American born children of the alien group, who were citizens by birth; and (3) approximately 45,000 minor children of both of the preceding groups.²⁸ Members of the several groups had lived together as families in the communities from which they came and were bound together by family ties. At the same time sharp differences existed between members of the first and second groups, not only because of the age differential in itself but also because of different degrees of assimilation to American culture²⁹ and the greater inclination of the second group to seek normal employment in American communities.³⁰ Members of the third group were necessarily dependent largely upon the members of the other two.

The evacuee population as a whole contains much higher percentages in the age brackets above 50 and below 30 years of age than is normal for the population of the country as a whole and con-

²⁷ R. S. Sec. 2169, now, as amended, 8 U. S. C., Supp. III, Sec. 703. See *Ozawa v. United States*, 260 U. S. 178.

²⁸ For age statistics see *Final Report*, p. 81; Hearings before Senate Committee on Military Affairs on S. 444, 78th Cong., 1st sess., p. 65.

²⁹ 1944 Appropriation Hearings, pp. 703-704.

³⁰ *Idem*, pp. 619, 640-641.

tains correspondingly fewer individuals in the most productive brackets between these two ages.³¹

Approximately 40,000 of the evacuees, in all, were thought to be available for employment which would alleviate the national manpower shortage.³²

The facts which gave rise to the danger that the West Coast Japanese population might contain sizable disloyal elements have been reviewed by this Court, *Hirabayashi v. United States*, 320 U. S. 81, 96-99. A significant element among the evacuees in this respect consists of those American citizens who were taken to Japan by their parents at an early age and were brought up in Japanese communities and educated in Japanese schools, but who returned to this country shortly before the involvement of the United States in the present war. There were approximately 2,000 individuals in this category, many of whom appear to have become attached to present-day Japan.³³ Additional Kibei, or persons who had been taken to Japan and had returned, but who had been there for shorter periods of time, numbered perhaps 6,000.³⁴

³¹ S. Doc. No. 96, pp. 8-9.

³² Hearings before Senate Committee on Military Affairs, *supra*, n. 28, p. 37.

³³ 1945 Appropriation Hearings, p. 612.

³⁴ Hearings before the Committee on Immigration and Naturalization, House of Representatives, 78th Cong., 2d sess., on H. R. 2701 and other bills to expatriate certain nationals of the United States, hereinafter cited as Expatriation Hearings, p. 56.

The task of the War Relocation Authority, taken in its entirety, has consisted of caring for the basic needs of the population just described, including education; promoting the loyalty and morale of the great majority; segregating from the others those whose release could not be authorized so far as the maintenance of family groups permitted;³⁵ promoting the permanent relocation in normal communities of as many as possible of the evacuees at the earliest practicable time; and providing indefinitely for those who have not left the Centers. As a means to these ends, detention of the evacuees to the Relocation Centers, subject to the release of individuals and families under the provisions of the leave regulations, has been continued down to the present time.

3. *Segregation of Certain Evacuees.*—In February and March of 1943 a registration of all persons in the Relocation Centers was conducted by the War Relocation Authority and the War Department jointly. The Army was interested in the male citizens over 17 years of age and W. R. A. wished to know as much as possible about the individuals of whom it had charge.³⁶ It was believed that if persons who wished to go to Japan and live there permanently and United States citizens who would not express unqualified loyalty to the United States were segregated and removed

³⁵ See Expatriation Hearings, p. 50.

³⁶ Expatriation Hearings, p. 50.

from the Relocation Centers, friction which had arisen in the Centers between groups with different loyalties would be eliminated. All persons 17 years of age and older were requested to fill out a questionnaire. Male citizens of the United States were asked, among other questions, whether they were willing to serve in the armed forces of the United States on combat duty wherever ordered (Ques. 27) and whether they would swear unqualified allegiance to the United States and forswear any form of allegiance to the Japanese Emperor or any other foreign government, power, or organization (Ques. 28). Female citizens were asked the same loyalty question and whether, if given the opportunity, they would volunteer for the Army Nurses Corps or the WAACS. Aliens were asked whether they would be law-abiding residents of the United States. All individuals were asked whether they desired to return to Japan to live.³⁷

Following the registration, individuals who had expressed a desire to go to Japan to reside and individuals who persisted in a refusal to answer the loyalty questions affirmatively were transferred to the Tule Lake Center. Loyal evacuees previously at Tule Lake, such as the appellant, were transferred to other Centers. The children and other members of the families of persons sent

³⁷ Senate Document No. 96, pp. 20-21; ~~Examination~~ ^{Registration} Hearings, pp. 37-42, 49-58.

to Tule Lake, who expressed a willingness to accompany them, were also transferred there. Approximately 17,000 persons were held at Tule Lake in April 1944.³⁸ Of these, approximately 5,000 were minor children of parents who did not themselves come within the categories established for segregation. Approximately 10,000 were included because they or members of their families had expressed a desire for repatriation to Japan.³⁹ It has been estimated that from 5,600 to 6,600 of the 38,816 citizens who filled out questionnaires persisted in refusing to answer the loyalty questions in the affirmative. An estimated additional number of between 3,000 and 4,000 expressed a desire to change negative to affirmative answers, their original negative answers having been caused by one or more of a variety of circumstances, such as temporary bitterness over the evacuation or pressure from elders or from members of the Kibei group.⁴⁰

4. *Progress of Permanent Relocation.*—The nature and development of the War Relocation Authority's program for permanent relocation is indicated by the leave regulations and procedures previously summarized (*supra*, pp. 15-21). In regard to "indefinite leave," however, a number of features of the program, in addition to the con-

³⁸ 1945 Appropriation Hearings, p. 611. The number was 18,684 on July 29, 1944.

³⁹ *Ibid.*

⁴⁰ Expatriation Hearings, pp. 37-42, 49-58.

ditions which must be satisfied before an evacuee can be granted leave, are worthy of note.

Financial assistance, including both a cash grant and travel expenses, has been extended to those persons departing on leave, who have not themselves possessed adequate resources. At present the cash grant which is made in proper cases is \$25 per person. This amount is available for each member of a family, whatever its size, so as to encourage individuals with large families to undertake permanent relocation.¹¹

In March 1944, in order to encourage less venturesome persons to leave, the procedures were enlarged to permit those granted indefinite leave to go out for a trial period. By agreement the permittee is permitted to return to the Center at the end of four months or at any time during the succeeding two months, with the same assistance upon return as is available in other cases for permittees leaving a Center. Persons granted such trial leave are, however, not given financial assistance upon leaving the Center.¹²

The War Relocation Authority has established a series of Relocation Offices throughout the country for the purpose of promoting community acceptance of evacuees who locate within the areas covered by these offices, of finding employment op-

¹¹ 1945 Appropriation Hearings, p. 627; W. R. A. Handbook, Section 60.13. Formerly a single individual received a grant of \$50 and there was a \$100 limit for a family.

¹² W. R. A. Handbook, Section 60.12.

portunities for evacuees, and of assisting evacuees upon their relocation. At present area offices are located in Denver, Colorado; Salt Lake City, Utah; Kansas City, Missouri; Little Rock, Arkansas; Chicago, Illinois; Cleveland, Ohio; New York City; and Boston, Massachusetts. In each of the areas served by these offices except the New England area, with headquarters in Boston, local or district offices have been established in the principal cities. Twenty ~~five~~^{5/K} such district offices have been established.

Community hostility toward the evacuees has diminished as a result of these efforts and the satisfactory records which evacuees have made. The instances in which evacuees have been apprehended or returned to Relocation Centers because of misconduct are negligible in number.⁴³

Despite this favorable record, incidents which reflect hostility toward relocated persons have recurred from time to time. Some of these are not matters of general knowledge, but others have been reported.⁴⁴ In 1943 bills directed against persons of Japanese ancestry were introduced in the legislatures of 14 States.⁴⁵ From time to time, as indications of possible trouble have arisen in particular communities because of the relocation

⁴³ 1945 Appropriation Hearings, pp. 610, 618, 634.

⁴⁴ Life Magazine, May 1, 1944, p. 13; Baltimore News and Post, May 13, 1944; "PM", April 25, 1944; Brooklyn Eagle, May 1, 1944; Provo (Utah) Herald, October 4, 1943.

⁴⁵ Korematsu brief, p. 15. 1945 Appropriation Hearings, pp. 609, 619.

within them of considerable numbers of evacuees, the War Relocation Authority has suspended the issuance of permits for relocation in these communities until such time as the situation appeared to have improved.

In these ways, by the foregoing administrative devices, the War Relocation Authority has maintained a delicate governance of the flow of relocation, always with the purpose of stimulating it to the greatest extent consistent with its successful accomplishment. Serious incidents, or a large number of instances of opposition to evacuees relocating in communities, it has been thought, would have stimulated general objection to the program and have retarded its progress greatly.

In April 1944 approximately 21,700 persons had received permits for indefinite leave, including both actual workers to the number of at least 15,000 and members of their families. In addition, approximately 2,400 evacuees were at that time out on seasonal leave.⁴⁰ As of July 29, 1944, the number on indefinite leave had increased to 28,911, leaving 61,002 evacuated persons in the eight remaining Centers other than Tule Lake. Consequently a considerable portion of the task of relocating the 40,000 evacuees who were thought to be employable (*supra*, p. 30) had been accomplished. The principal problem now is to induce additional individuals to go out.

⁴⁰ *Idem*, p. 610.

5. *Present Situation of the Appellant.*—As a result of the foregoing measures, the appellant would be free to leave the Relocation Center if she would apply for and receive an indefinite leave permit. The principal requirements for leave in her case would be that she (1) agree to report changes of address and of employment, (2) satisfy the Project Director as to employment or financial support, and (3) select a place of destination which the Project Director would approve as one in which she would be likely to be accepted. In qualifying for a permit, the appellant may have the advantage of the following forms of assistance at the hands of the Relocation Authority: (1) recommendation of communities in which she will be accepted; (2) referral to opportunities for employment by the Relocation Offices maintained by the Authority; (3) a cash grant, if needed, to assist her in reaching a specified destination and becoming established there; and (4) assistance at the point of destination in finding actual employment and becoming adjusted. It would not be necessary for the appellant to select a position before leaving the Relocation Center; she would be permitted to leave if she signified her intention to accept suitable employment opportunities with the aid of a Relocation Office. If the appellant has independent means of subsistence and can give assurance that they will be used to maintain her, she may be authorized to depart for a suitable

destination without reference to possible employment.

SUMMARY OF ARGUMENT

The narrow question presented is whether one in the situation of appellant is lawfully detained in a Relocation Center pending compliance with the War Relocation Authority Leave Regulations, as a means of securing the orderly relocation in communities outside the West Coast area of the group of evacuees from that area, the evacuation itself having been ordered as a matter of military judgment under the circumstances set forth in *Hirabayashi v. United States*, 320 U. S. 81, and in the Government's brief in *Korematsu v. United States*, No. 22, this Term.

I

Certain subsidiary questions are discussed to the following effect:

(1) The removal of the ^{APPELLANT}~~petitioner~~ by the War Relocation Authority in regular course to a place outside the district and circuit in which the case arose, after the appeal to the Circuit Court of Appeals had been filed, raises the question of whether the courts below were deprived of jurisdiction and whether the case has become moot. The authorities upon this question are inconclusive.

(2) The record in the case, supplemented by the facts and factors relied upon in this brief, affords

an adequate basis for a decision upon the validity of appellant's detention in a Relocation Center.

(3) The Government does not invoke the doctrine that administrative remedies must be exhausted before resort to a court. Appellant has declined to apply for permission to leave the Relocation Center as the W. R. A. leave regulations permit her to do. The question is whether she may be required so to apply as a condition of leave, in order that the determinations for which the leave regulations call may be made.

(4) The issue of continued exclusion of the appellant from the West Coast area, to which she desires to return, is not involved in this case. She is excluded from the West Coast, not by the regulations of the War Relocation Authority, but by military orders which have effect independently of the W. R. A. regulations and of her confinement. If the relief for which she prays is granted, she will be set free. The question of her right to go into any particular part of the country can only arise if she endeavors to go there.

If, however, this Court should be of the view that the validity of continued exclusion of the appellant from the West Coast is involved because of the position the appellant has taken in the affidavit filed in the trial court, we suggest that the cause should be remanded for issuance of the

writ and, if necessary, a trial of the issues which underlie the validity of continued exclusion. The Government is not in a position to present the facts relating to the military situation which would be relevant to the continued West Coast exclusion. These facts may be developed by testimonial processes, as similar facts have been in a number of recent instances.

II

The authority for the appellant's detention involves initially the question of whether Executive Order No. 9102 (*infra*, pp. 92-96), as ratified by appropriation acts of the Congress, or Executive Order No. 9066, as ratified by the Act of March 21, 1942 (*infra*, pp. 86-87, 90-92), or both these Orders as ratified, authorize her detention. The intent of the Orders is evidenced by the actions of the military authorities and executive officials who have been entrusted with their administration. The ratification of the Orders by Congress turns, however, upon their terms and the attention which their administration has received at the hands of the Congress.

Executive Order No. 9102 directs the War Relocation Authority to formulate and effect a program for the relocation, maintenance, and supervision of persons removed from military areas and gives the Director of the Authority power to prescribe regulations to this end. Under

the Order relocation is considered to be an integral part of the evacuation from the West Coast. The detention which is an incident to relocation is, therefore, a continued consequence of the evacuation and, as such, comes within the Executive Order.

There has been continued Congressional awareness of the nature of the War Relocation Authority's regulations and procedures, as is evidenced by hearings and committee reports which have dealt with the subject. In addition, a message from the President and a Statement of the Director of War Mobilization, which were transmitted to the Senate in September 1943 contained a review of the entire relocation program. While possessed of the information which it had thus obtained, the Congress twice appropriated funds for the operations of the War Relocation Authority.

Executive Order No. 9066, in order to provide protection against espionage and sabotage, confers authority to establish military areas and to impose restrictions upon the right of any person to enter, remain in, or leave such areas. Public Proclamation No. 8 of the Commanding General of the Western Defense Command, pursuant to which appellant is restrained until released by the War Relocation Authority, was promulgated under Executive Order No. 9066 for the purpose therein prescribed. It is not argued that the detention of

appellant is directly necessary to the prevention of espionage or sabotage; but the Executive Order was considered by the responsible officials to authorize the detention which has been imposed, as a means of dealing with the consequences of the evacuation which was ordered for the prevention of espionage and sabotage. The authority to deal in this way with the consequences of a measure which was ordered for the prescribed purpose is within the power conferred by the Order.

If appellant's detention is within the authority conferred by Executive Order No. 9066, it is also within the authority granted by the Act of March 21, 1942, since it has been determined in *Hirabayashi v. United States*, 320 U. S., at p. 91, that the Order was ratified and confirmed by the Act.

If Executive Order No. 9066 purports to confer authority to authorize the detention to which the appellant is now subject, the delegation of this authority is not invalid upon the ground that discretion has been unconstitutionally delegated. Not only does the Order lay down the requirement that all measures taken under it be for the purpose of protection against espionage and sabotage, but the legislative history of the Act of March 21, 1942 shows that the exclusion of persons of Japanese ancestry from the West Coast was contemplated at the time the Act was adopted. The delegation of authority, considered with reference to the terms of the Order and the measures con-

templated by Congress, is not broader than others that have been sustained even in peacetime. The delegation of authority of even greater breadth is recognized as appropriate under the war power. *United States v. Chemical Foundation*, 272 U. S. 1; *Yakus v. United States*, 321 U. S. 414, 426.

III

The validity of appellant's detention under the war power, assuming it to have been authorized, depends upon the scope of the war power of both the Congress and the President, rather than of either alone. *Hirabayashi v. United States*, 320 U. S., at pp. 92-93. Their action is to be sustained if there is "any substantial basis" or any "reasonable ground" for concluding that it is related to the war effort. Nor is the war power confined to measures which promote the progress of the war and tend to produce a successful outcome. It embraces also "the power * * * to remedy the evils which have arisen" during the progress of a war. *Stewart v. Kahn*, 11 Wall. 493, 507. The program of the War Relocation Authority has been undertaken as a result of the situation created by the West Coast evacuation, which was itself undertaken as a measure necessary in the prosecution of the war. It can scarcely be questioned that, as such, it comes within the war power if reasonably devised.

The sole question that is open is whether under the circumstances it offends due process of law.

The validity as a matter of due process of the requirement of cooperation on the part of appellant, as a condition of the restoration of her freedom, cannot be negatively determined by the broad assertion that detention *per se* is violative of the Fifth Amendment except as a punishment for crime or for the prevention of criminal conduct. The confinement of individuals under other circumstances may result from executive or administrative action. The confinement of jurors and material witnesses and of persons who are confined in the interests of health, whether for their own protection or that of others, are well-known examples. Hardships in individual cases may arise from a valid system of detention because of general considerations. In emergencies, *Home Building and Loan Association v. Blaisdell*, 290 U. S. 398, 425-426, and in time of war, *Hirabayashi v. United States*, 320 U. S. 81, 93; *Yakus v. United States*, 321 U. S. 414, 443, the public power may be exercised in ways not normally valid. None of the authorities adduced determines the serious issue now confronting the Court; but they suggest applicable considerations. While it is to be stressed, in addition, that the freedom of the individual is not to be unduly infringed, the unusual measures demanded by military necessity affect the application of this principle.

The military necessity for the evacuation and the nature of the problems growing out of it have given rise to the relocation measures. Careful procedures have been devised to enable the evacuees to become established in communities as rapidly as possible. The plan for minimizing their hardships has entailed a restriction of individual freedom. It is not contended that under any set of circumstances less unique or less definitely a product of an extreme war measure, personal liberty might be impaired for similar reasons; but we believe there is a reasonable basis for the view that in the light of the rare conditions which brought on the program the Constitution does not require abandonment of the regulations here involved.

ARGUMENT

The appellant has been granted leave clearance by the War Relocation Authority as a person whose release would be consistent with national security. Under military restrictions and W. R. A. regulations she is prohibited from leaving the Relocation Center until she applies for and obtains leave based on approval of her proposed destination and a finding that she has adequate means of financial support. All possible assistance has been made available to enable the appellant and others in the same category to meet these requirements. Suitable locations and employment have been found for them pursuant

to a policy of encouraging permanent relocation as far as possible. Appellant's application to proceed to any one of many destinations, with financial assistance if needed, there to select from among the opportunities for employment to which she would be referred or to accept employment of her own choosing, would almost certainly be granted. The narrow issue presented, therefore, is whether appellant is lawfully detained in a Relocation Center because of the operation of War Relocation Authority procedures to which she refuses to conform and which have as their purpose an orderly relocation of evacuees, freed so far as possible from the harmful consequences of unregulated and unrestricted resettlement, bearing in mind that those procedures are designed as a means of restoring the liberty of which she was originally deprived because of the exclusion of persons of Japanese ancestry from the West Coast area as a matter of military judgment under the circumstances set forth in the opinion of this Court in *Hirabayashi v. United States* and in the Government's briefs in that case and in the *Korematsu* case, this Term.

Subsidiary Questions

Certain subsidiary questions presented by the procedure in the present case and by the decision of the District Court will be treated briefly before discussion of the principal issue.

1. *The question of jurisdiction.*—As previously pointed out, the appellant, while her appeal to the

Circuit Court of Appeals was pending, was moved from the Tule Lake Relocation Center in the Northern District of California, where she was detained at the time her petition was filed in the District Court, to the Central Utah Relocation Center, in a different district and circuit. The Court may wish to consider whether this fact deprives the courts below of jurisdiction.

This Court has recently denied two petitions for writs of certiorari in habeas corpus cases upon the ground that the controversies had become moot under similar circumstances. *United States ex rel. Innes v. Crystal*, 319 U. S. 755; *United States ex rel. Lynn v. Downer*, No. 941, October Term, 1943.

Whether the present proceeding can be said to have been rendered moot by the petitioner's removal involves the question whether the jurisdiction which the District Court acquired has continued. This involves the further question whether jurisdiction in habeas corpus rests primarily upon the presence of a respondent in the jurisdiction of the court in which the petition is filed or upon the location of the petitioner's place of confinement within the territorial jurisdiction. If the former, the cause continues to be a genuine one so long as the respondent retains control of the petitioner; if the latter, the cause terminates upon removal of the petitioner from the territorial jurisdiction of the court, unless a writ has issued or some other basis exists for

regarding a controversy respecting the petitioner's custody as continuing before the court.

No suggestion arises that the removal of the appellant was in any sense improper or in derogation of the court's jurisdiction. The District Court had issued no writ, but had dismissed the petition as insufficient upon its face. No basis is suggested for concluding that the normal operations of an agency of the Executive Branch must be suspended following the refusal of a writ of habeas corpus, merely because an appeal from the refusal is possible or has been filed. On the contrary, it has been held that, absent statutory authority, no basis exists upon which the court which has denied a writ may dispose of the custody of the petitioner pending his appeal. *Bongiovanni v. Ward*, 50 F. Supp. 3 (D. Mass.); see also *In re Collins*, 151 Calif. 340, 351-352, 90 Pac. 827, 91 Pac. 397.⁴⁷

⁴⁷ In *Ex parte Catanzaro*, 138 F. (2d) 100 (C. C. A. 3), it was suggested by the court that Rule 45 (1) of this Court, which provides that "pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed," requires the respondent in the habeas corpus proceeding to retain the custody of the petitioner after an appeal from the denial of a writ has been filed, until a final decision has been rendered. It seems, however, that the purpose of this Rule is to prevent a court from disturbing the custody of the petitioner pending the appeal, when nothing more substantial with reference to the merits than a petition once adjudged invalid, and an appeal, have been filed or issued, rather than to stay the hand of the Executive Branch with reference to the petitioner. *In re McKane*, 61 Fed. 205 (C. C. S. D. N. Y.). Rule 45 (2) which governs appeals from orders discharg-

The present appellant was not wrongly transferred from one Relocation Center to another outside the district and circuit in which her cause was pending. The questions, therefore, are (1) whether a proper respondent remains in the case, (2) whether the fact that the appellant is no longer within the jurisdiction of the District Court and Circuit Court of Appeals renders the cause moot, and (3) whether the cause continues for some other reason.

The petition alleged that appellant's liberty was restrained by the Commanding General of the Western Defense Command, in addition to the local officials of the Relocation Center and the Director of W. R. A. That officer continues to have his official headquarters at the Presidio in San Francisco within the Northern District of California and continues to have power over the custody of the appellant, since the restraint upon her is exercised by virtue of Public Proclamation No. 8 of his command (*supra*, p. 14). Neither he nor the Director of the War Relocation Authority, however, was properly named as a respondent, since neither of them was the immediate physical custodian of the appellant in the sense which would warrant the issuance of a writ of habeas corpus directed to him. *Jones v. Bidelle*, 131 F. (2d) 853 (C. C. A. 8), certiorari denied, 318 U. S. 784.

ing writs of habeas corpus, by contrast provides that pending an appeal the prisoner may be remanded to custody or enlarged upon recognizance as the court rendering the decision may determine.

It is probably immaterial whether a particular respondent who remains within the territory of the District Court can be identified, since no respondent was ever served with process or appeared in the proceedings. The United States Attorney for the Northern District of California argued before the Court that the appellant's petition for a writ of habeas corpus was invalid upon its face. This Court held in *Ex parte Milligan*, 4 Wall. 2, that a cause exists in this state of the proceedings, the parties to which are the petitioner and the Government of the United States. Accordingly, an appeal lies from the refusal of a writ, without appearance by any respondent. 4 Wall. at p. 112; *Ex parte Quirin*, 317 U. S. 1, 24.

It is possible, nevertheless, that the cause disappears if the petitioner's place of custody ceases to be within the jurisdiction of the court in which the petition was filed or if the original respondent ceases to be the custodian. Such may be the inference to be derived from the *Innes* and *Lynn* cases, *supra*. In the *Lynn* case a writ had issued and been discharged. Pending an appeal to the Circuit Court of Appeals, the petitioner, who was in the Army, was moved overseas. The original respondent had retired from active duty. It was held that the cause had become moot. In the *Innes* case also a writ had issued and been discharged.

The petitioner in that case was moved from the territorial jurisdiction of the courts below during the course of the proceeding.

The basic question of the ground of jurisdiction appears on the basis of older authorities to be somewhat doubtful. In *Ex parte Milligan, supra*, the fact seems to have been that the petitioner had been removed from the District of Indiana, in which the cause arose, and from the Seventh Circuit within which the district lay, and also from the custody of the original respondent, before the case was argued in the Supreme Court. Klaus, *American Trials, Ex parte: In the Matter of Lamdin P. Milligan*, p. 41. It does not appear from the report of the case, however, that the attention of the Court was called to the change in the place of Milligan's detention. Answering the Circuit Court's question,* the Court stated "that on the facts stated in said petition and exhibits a writ of *habeas corpus* ought to be issued, according to the prayer of the said petitioner" (4 Wall., at

* It is suggested in *McMaster v. Gould*, 240 N. Y. 379, 148 N. E. 556, 40 A. L. R. 792, that a question certified by an intermediate court should be answered as of the time of the trial court decision to which it relates. This principle would not apply to the present case, since the entire record has been certified up, and the Court will proceed to "decide the whole matter in controversy in the same manner as if it had been brought * * * [up] by appeal." Judicial Code, Section 239, 28 U. S. C. Sec. 346; Act of February 13, 1925, c. 229, Sec. 6, 43 Stat. 940, 28 U. S. C. Sec. 463 (d).

p. 107); but the Court did not say to whom the writ should be directed. The case was never concluded, however, since the President, following the Supreme Court's decision, remitted Milligan's sentence and ordered his release. Klaus, *op. cit.*, p. 44.⁴⁹

In *United States v. Davis*, 5 Cranch C. C. 622, 25 Fed. Cas. 775; *Ex parte Fong Yim*, 134 Fed. 938 (S. D. N. Y.), and *Ex parte Ng Quong Ming*, 135 Fed. 378 (S. D. N. Y.), it was held that the presence of a respondent in the jurisdiction, having power with respect to the petitioner's custody within or without the jurisdiction, is the basis of a court's authority to entertain a habeas corpus proceeding.⁵⁰ In *Sanders v. Allen*, 100 F. (2d) 717 (App. D. C.), it was held that habeas corpus would lie in the District of Columbia against an official of the District who was holding the petitioner in custody in a District of Columbia institution located in Virginia. The circumstances of this case are somewhat unusual, but the court expressed the view that jurisdiction depends upon the presence of a respondent within the area of the

⁴⁹ Milligan's counsel assumed that the original ~~District~~ ^{Circuit} Court would no longer have had jurisdiction, for he proceeded to Columbus and there secured a writ of habeas corpus. *Ibid.*

⁵⁰ In Great Britain it was held in *Ex parte O'Brien* [1923] 2 K. B. 361, that a writ of habeas corpus might issue to the Secretary of State in England who had transferred the petitioner's custody to the Government of the Irish Free State, since there was an arrangement whereby the respondent was able to control the disposition of the petitioner.

court's authority and not upon the place of detention.

Apparently to the contrary, holding that the place of confinement must be within the court's territorial jurisdiction, are *In re Boles*, 48 Fed. 75 (C. C. A. 8); *Ex parte Gouyet*, 175 Fed. 230 (D. Mont.); *United States ex rel. Belardi v. Day*, 50 F. (2d) 816 (C. C. A. 3), and *United States ex rel. Harrington v. Schlotfeldt*, 136 F. (2d) 935 (C. C. A. 7). In the *Boles*, *Gouyet*, and *Harrington* cases, however, the respondents, as well as the place of detention, were outside the jurisdiction of the particular courts.

In a leading American case, *In the Matter of Samuel W. Jackson*, 15 Mich. 417, the four judges of the Supreme Court of Michigan divided evenly with regard to the jurisdictional question involved in the present case. Cooley, J., with whom Christiancy, J. concurred, took the view that jurisdiction depended upon the presence of a proper respondent within the territorial jurisdiction of the court; Campbell, J. and Martin, Ch. J. took the position that habeas corpus cannot lie to test the detention of an individual in another State.

It seems to be fairly certain that a court will rarely entertain a habeas corpus proceeding to challenge the detention of a petitioner beyond its territorial jurisdiction; but there are cases in which it has been done, usually because of circumstances which caused the actual controversy to relate to matters arising within the jurisdiction.

The statute upon which the jurisdiction of the Federal courts in habeas corpus rests, R. S. 752, 28 U. S. C. Sec. 452, is inconclusive upon the question. It reads as follows:

The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit, that a district judge has within his district; and the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

The concluding sentence of this section was added by Section 6 of the Act of February 13, 1925, c. 229, 43 Stat. 940. It is believed not to be significant with regard to the present question, since its purpose was to designate the court, after the termination of the circuit courts, in which a habeas corpus proceeding conducted by a circuit judge should be recorded. It does not appear that there was any intention to change the extent of jurisdiction in habeas corpus proceedings.

Ex parte Catanzaro, 138 F. (2d) 400, *supra*, holds that under circumstances similar to those in the present case an appeal is not defeated by the removal of the petitioner from the jurisdiction.

As previously mentioned, however, reliance is placed in part upon Rule 45 (1) of this Court. The *Catanzaro*, *Lynn* and *Innes* cases seem to be the authorities most directly in point upon the question of possible mootness as it arises in the instant case.³¹

2. *Issues Presented by the Record.*—The present record consists of the petition (R. 2-10) and two affidavits in respect to the appellant's failure to make application for leave from the Relocation Center after the regulations providing for such leave had been promulgated (R. 11-15). The data relevant to the appellant's detention embrace allegations in the petition and the statutes, Executive Orders, proclamations and regulations which govern persons in a Relocation Center and of which the District Court properly took judicial notice. The affidavits in the record disclose facts pertinent to appellant's failure to apply for leave from the Relocation Center. Although affidavits are ordinarily not an adequate substitute for properly adduced evidence, it is believed that in this case it is unnecessary to give effect to this rule. The affidavit of appellant's counsel may be treated as an amendment to the petition. So far as appellant's detention in a Relocation Center is concerned, we submit to the Court in this brief the facts and factors which are relied upon. 11

³¹ The authorities cited in the memorandum decisions in the *Innes* and *Lynn* cases relate to the effect of a complete release from custody upon pending habeas corpus proceedings.

the question of continued exclusion from the West Coast is involved (see *infra*, pp. 58-60), it is believed, for reasons which will be stated, that the cause should be remanded. We do not urge that the issue of the validity of the War Relocation Authority leave regulations cannot be satisfactorily determined on the basis of the present record and the facts and factors which are set forth in this brief, assuming jurisdiction. Final decisions in habeas corpus proceedings upon such a basis are, of course, common. *Ex parte Quirin*, 317 U.S. 1; *Ex parte Milligan*, 4 Wall. 2; *Ex parte Watkins*, 3 Pet. 193, 201.

3. *Applicability of Doctrine of Exhaustion of Administrative Remedies.*—The decision of the District Court dismissing the petition was based in part on the ground that the petitioner had not exhausted her administrative remedy under W. R. A. regulations (R. 15). The regulations were called to the court's attention by the affidavit of the Acting Director at the Tule Lake War Relocation Center where the appellant was detained (R. 11-13) and were properly noticed by it. The regulations provided for indefinite leave upon application when the Director of the War Relocation Authority was satisfied that the applicant was willing to report changes of residence and employment to W. R. A. following departure, that the applicant would have employment or other means of support and could successfully maintain

residence at the proposed destination, and that the issuance of a permit would not interfere with the war program or otherwise endanger public peace and security (*infra*, pp. 122-123). An affidavit on behalf of appellant by her attorney alleged that the regulations made no provision for the return of the appellant to her place of residence in Sacramento, California; that it would be useless to make application for her return there; and that the appellant was confined against her will and was refused the right to return (R. 14-15).

~~The Government does not invoke the doctrine that administrative remedies must be exhausted prior to a judicial determination of the question presented, because the issue which petitioner poses in seeking habeas corpus is the validity of the regulations under which the administrative remedy is prescribed.~~

The Government does not invoke the doctrine that administrative remedies must be exhausted prior to a judicial determination of the questions presented, because the issue which appellant poses in seeking habeas corpus is the validity of the regulations under which the administrative remedy is prescribed.

Her failure to apply for leave can not foreclose the question whether her rights were invaded by the requirement that she make such an application. The more difficult problem is the scope of the issue upon which the merits of the controversy

turn. Since it cannot be said that she will not obtain her liberty should she apply for leave, it may be urged that the question before the Court is the narrow one whether she may be detained pending such application and an opportunity to act thereon; that is, that she has no standing to put in issue the invalidity of detention should her application, if filed, be denied. It may be argued in reply that unless individuals can validly be detained after an adverse determination with respect to the conditions for leave they can not validly be detained for the more limited purpose of permitting such determinations to be made. While no decision directly controls, we have presented the case on the basis of the broader issue being involved.

4. *Disposition of Issue of Continued Exclusion From the West Coast.*—It appears from the affidavit of appellant's counsel with respect to her reason for not making application for leave from the Relocation Center (R. 14-15) that she declines to employ the available procedures because they could not eventuate in an authorization for her return to Sacramento, California, where she desires to go. Sacramento is in the West Coast area from which Public Proclamations Nos. 7 and 11 (*infra*, pp. 106-109) continue to exclude her. Thus it appears her objection to the regulations is centered upon their omission of any provision for permitting her to return to the West Coast. She is also excluded from Sacramento itself by

Civilian Exclusion Order No. 52 (*infra*, pp. 116-117).

It is the Government's view that the issue of continued exclusion of persons of Japanese ancestry from the West Coast area is not involved in this case. The appellant is not confined within the forbidden zones. She seeks her release from custody. If the relief for which she prays is granted, she will be set free. The question of her subsequent right to go into any particular part of the country⁵² would arise if she then endeavored to go there. Habeas corpus does not lie to test a geographical restriction upon freedom of movement, *Wales v. Whitney*, 114 U. S. 564, just as it does not lie to test the validity of allegedly excessive bail. *Stallings v. Splain*, 253 U. S. 339; *Johnson v. Hoy*, 227 U. S. 245.

It is true that the validity of the continued detention of the appellant depends upon the purposes for which this detention is maintained and that these purposes include the continued exclusion

If the Relocation Center were in the coastal area, as several are, the question would then be whether she would be under a duty to leave the area upon regaining her freedom. Only if the court thought it necessary to require her to leave as a condition of granting relief would the issue of continued exclusion arise. See *Tad v. Waldman*, 266 U. S. 113; *U. S. ex rel. Chong Mon v. Day*, 36 F. (2d) 278 (S. D. N. Y.); *U. S. ex rel. Rizzo v. Curran*, 17 F. (2d) 233, 235 (S. D. N. Y.), with regard to the conditional release of habeas corpus petitioners. The courts are directed by statute "to dispose of the party as law and justice require." R. S. Sec. 761, 28 U. S. C. Sec. 461.

of persons of Japanese ancestry from the West Coast area. That exclusion, however, rests upon military regulations distinct from War Relocation Authority regulations. The military regulations will be in effect whether the evacuees are released from War Relocation Centers or whether they continue to be there restrained. The military authorities in maintaining the exclusion are not governed by the War Relocation Authority's leave clearance and leave determinations. It would seem that the question of the validity of the W. R. A. regulations applicable to the appellant may be determined without deciding the question of her right to return to Sacramento.

Should this Court be of the view that the validity of continued exclusion of the appellant from the West Coast is involved, or is the issue which appellant tenders, we suggest that the cause should be remanded for issuance of the writ or a rule to show cause, followed by an answer or return and, if necessary, trial of the issues which underlie the validity of such continued exclusion. The Government is not in a position to present to the Court, in the manner in which the relocation problem has been presented, the facts relating to the military situation which would be relevant to the issue of continued exclusion from the West Coast. It would require, as we now believe, evidence adduced by testimonial processes to permit a satisfactory determination of this question.

This Court, of course, has frequently remanded cases which involved constitutional issues for a hearing upon relevant facts, where these facts are not already in the record and are not before the Court by virtue of judicial notice. *Chastleton Corp. v. Sinclair*, 264 U. S. 543; *City of Hammond v. Schappi Bus Line*, 275 U. S. 164; *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, 212; *Polk Co. v. Glover*, 305 U. S. 5; *Gibbs v. Buck*, 307 U. S. 66. Habeas corpus cases, as well as others, may be remanded. *Johnson v. Zerbst*, 304 U. S. 458; *Walker v. Johnson*, 312 U. S. 275. The facts relating to a widespreading military situation may, of course, be developed by testimonial processes, as they have been in a number of recent instances⁵³

I

THE QUESTION OF WHETHER CONGRESS OR THE PRESIDENT HAS GRANTED AUTHORITY TO DETAIN SUCH PERSONS AS APPELLANT PENDING THEIR COMPLIANCE WITH THE CONDITIONS FOR OBTAINING PERMISSION TO LEAVE A RELOCATION CENTER

The authority for the appellant's detention is contained either in Executive Order No. 9102 as

⁵³ In *Schueller v. Drum*, 51 F. Supp. 383 (E. D. Pa.); *Ebel v. Drum*, 52 F. Supp. 189 (D. Mass.); *Wilcox v. De Witt*, decided September 4, 1943 (S. D. Cal.); and *Scherzberg v. Grunert*, decided July 21, 1944 (E. D. Pa.), direct testimony was obtained from the military authorities concerning the domestic military situation. The facts as to the necessity for the suspension of the privilege of the writ of habeas corpus and for martial law in Hawaii have also been tried recently. *U. S. ex rel. Duncan v. Kahanamoku*, decided April 13, 1944 (D. Hawaii).

ratified by appropriation acts of the Congress, or in Executive Order No. 9066 as ratified by the Act of March 21, 1942 (18 U. S. C., Supp. III, Sec. 97a), or in both of these Executive Orders as ratified. In measuring the scope of the Executive Orders it is of prime significance that the challenged regulations were publicly issued by the officers of the Government authorized to carry the program into effect; their action constitutes an administrative construction which we believe is entitled to great weight. The texts of the Orders and Congressional understanding of their meaning and knowledge of the actions taken determine whether these actions have been ratified. The question will be considered with reference to each Order separately.

A. *Scope, Application, and Ratification of Executive Order No. 9102.*—This Executive Order, dated March 18, 1942 (*infra*, pp. 92-96), recites that its purpose is to provide for the removal of persons from designated areas in the interest of national security. It directs the Director of the War Relocation Authority to formulate and to effectuate a program for the removal, relocation, maintenance and supervision of such persons and gives the Director authority to provide for the relocation of such persons in appropriate places, to supervise their activities, to provide for their employment, and to prescribe regulations necessary or desirable to promote the effective execution of the program.

The broad terms of the Order make it clear that relocation was considered to be a phase of the program of evacuation and, as such, a responsibility of the Government. In order to discharge this responsibility the Director of the War Relocation Authority was expressly given power to prescribe regulations for the relocation of the evacuees in appropriate places, for their employment, and for the supervision of their activities. It seems clear that the Director was thus authorized to provide in the regulations that in relocating persons community conditions and available means of financial support should be considered. We think there is a reasonable foundation for the view that the Order supplies a basis for the detention pending the issuance of leave which is required by Public Proclamations No. 8 and No. W. D. 1 (*infra*, pp. 109-114) and in the W. R. A. leave regulations.

The heart of the relocation program has lain in (1) the segregation of evacuees who could not be released from those who could be, consistently with national security, and (2) the leave procedures, involving supervised relocation of those found to be loyal and the detention of individuals pending its accomplishment. The leave regulations provide for a planned and orderly relocation in place of one that might be helter-skelter and spasmodic. They enable the preparation of public opinion in the communities to which the evacuees wish to go, with consequent avoidance of opposi-

tion including possible violence, and other evil consequences as well as assistance to individuals in securing economic opportunity. The Leave Regulations "stem the flow" and convert what might otherwise be a dangerously disorderly migration of unwanted people to unprepared communities into a planned migration to communities that give promise of being able to assimilate the newcomers without incidents, to mutual advantage and with resulting furtherance of additional relocations.

The facts stated above (pp. 25-28) and in the Government's brief in *Korematsu v. United States*, No. 22, this Term, indicate the basis upon which the responsible government authorities apprehended that the unsupervised evacuation of over 100,000 persons of Japanese ancestry from the West Coast to the interior might have resulted in hardship and in disorder in the communities through which the evacuees might travel or in which they might attempt to settle. Similar considerations underlie the belief that the unsupervised release at the present time from the War Relocation Centers of persons in the situation of the appellant might have similar results, although the situation has mitigated since the time of the original evacuation. The fact that these persons are free from suspicion of disloyalty does not insure that their release might not produce serious consequences both to them and to others who have relocated. The detention for an additional period

of the group which has been granted leave clearance but which has not yet received indefinite leave, is a continued consequence of the original exclusion, growing out of the decision to resort to a controlled evacuation. The effects of the evacuation remain to be dealt with, a fact which supports the view that the leave regulations as maintained are authorized by the Executive Order.

On September 14, 1943, the President forwarded to the Senate a message in response to its Resolution No. 166, transmitting a Statement of the Director of War Mobilization with Reference to the Treatment of Persons of Japanese Ancestry in Relocation Centers (Sen. Doc. No. 96; n. 16, p. 25, *supra*). The Statement refers to the requirement that an applicant for leave must have means of support outside the areas from which he has been excluded and to the requirement that the Authority must be reasonably assured that the community in which he proposes to relocate will accept him without incident. The Statement advances the view that "the detention * * * of citizens of the United States against whom no charges of disloyalty or subversiveness have been made, for longer than the minimum period necessary to screen the loyal from the disloyal; and to provide the necessary guidance for relocation, is beyond the power of the War Relocation Authority" (pp. 18-19), thus calling attention to the fact that loyal persons were being detained for periods necessary to arrange for relocation.

Congressional awareness of the nature of the War Relocation Authority's regulations and procedures is evidenced generally by the reports and hearings referred to above (p. 24), which have been directed to all aspects of the Authority's operations. The prompt release of the loyal evacuees, as well as the effective segregation of the disloyal, have at times been an object of concern in Congress.⁵⁴ In the light of this awareness, Congressional ratification of the detention of loyal evacuees under the leave regulations through the adoption of the 1944 and 1945 Appropriation Acts⁵⁵ may be judged. The W. R. A. leave program was mentioned in both House and Senate committee hearings and on the floor of the House prior to passage of the 1944 Act.⁵⁶ During the discussion of the bill Congress had before it a report of a subcommittee of the Senate Committee on Military Affairs (approved by the

⁵⁴ Report and Minority Views of the Special Committee on Un-American Activities, H. R. Rep. No. 717, 78th Cong., 1st sess., Minority Views, pp. 18, 23-24; Hearings before Subcommittee of the Senate Committee on Military Affairs, *supra*, n. 15, p. 24, at pp. 45-46.

⁵⁵ National War Agencies Appropriation Act for 1944, P. L. 739, 78th Cong., 1st sess., approved July 12, 1943; *idem* for 1945, P. L. 372, 78th Cong., 2d sess., approved June 28, 1944.

⁵⁶ 1944 Appropriation Hearings, p. 710; Hearings before Senate Appropriations Subcommittee p. 382; 89 Cong. Rec. 6071, 6073; see also 89 Cong. Rec. pp. 5983-5985, 6008, 6834, 6836, 7138.

Senate Committee on May 7, 1943), in which there are references to the detention of loyal persons.⁵⁷

B. Scope, Application and Ratification of Executive Order No. 9066.—Executive Order No. 9066,

in order to provide for all possible protection against espionage and sabotage to national defense materials, premises and utilities as defined by statute, conferred upon the Secretary of War and military commanders designated by him the authority to establish military areas and to impose restrictions on the right of any person to enter, remain in, or leave such areas.⁵⁸ General DeWitt's Public Proclamation No. 8 of June 27, 1942 (*infra*, pp. 109–111) designated all Relocation Centers in the Western Defense Command as War Relocation Project Areas and prohibited any person of Japanese ancestry from leaving a Center without written authorization executed by authority from his Command. By letter of August 11, 1942, General DeWitt authorized W. R. A. to issue permits for persons to leave such War Relocation Project Areas.⁵⁹

⁵⁷ Report of the Subcommittee on Japanese War Relocation Centers to the Committee on Military Affairs, on S. 944 and S. Res. 101 and 411, 78th Cong., 1st sess., pp. 4–5.

⁵⁸ The Secretary of War's Public Proclamation No. W. D. 1 of August 13, 1942, designated all War Relocation Centers outside of the Western Defense Command as military areas and prohibited the egress of any person without permission from the Secretary of War or the Director of the War Relocation Authority.

Public Proclamation No. 8 expressly refers to the establishment of military areas by Public Proclamations Nos. 1 and 2 (*infra*, p. 97-105) and then recites that the situation within these military areas requires, as a matter of military necessity, that evacuees be removed to Relocation Centers for relocation, maintenance, and supervision; that these Centers be designated War Relocation Project Areas; and that appropriate restrictions be promulgated with respect to the right of the evacuees and of all other persons to enter, remain in, or leave such areas. In view of the reference in Proclamation No. 8 to Proclamations Nos. 1 and 2 and the fact that these Proclamations recite the military necessity for protection against espionage or sabotage such as might accompany an invasion, it may be said that Proclamation No. 8 was founded upon these recitals and was issued to further the same objective of preventing espionage and sabotage in connection with an attempted invasion.³⁹

In view of the grant of leave clearance to the appellant upon the determination that her release would not impede the war effort or be contrary

³⁹ In *Hirabayashi v. United States*, 320 U.S. 81, 103, this Court stated that Proclamation No. 3, which established the curfew regulation involved in that case, prescribed regulations of the type which Public Proclamations Nos. 1 and 2 had announced would be prescribed at a future date and was thus founded on the findings of Proclamations Nos. 1 and 2 in respect of protection against espionage and sabotage even though Proclamation No. 3 did not repeat these findings.

to public peace and safety, which means in effect that she is found not to be disloyal, it is not argued that the appellant's detention pending compliance with the W. R. A. Leave Regulations is of itself directly connected with the prevention of espionage and sabotage at the present time. The Executive Order, however, authorizes regulations for the supervision and protection of persons affected by the evacuation which had been found to be necessary for protection against espionage and sabotage. The Executive Order thus confers power to make regulations necessary and proper for controlling situations created by the exercise of the powers expressly conferred for protection against espionage and sabotage. Detention, pending leave, is required by the regulations prescribed. The appellant is in the Relocation Center as a result of the method adopted to accomplish the evacuation which was ordered for the prescribed purpose. She is detained only pending compliance with a regulation designed to effect an orderly termination of the evacuation. Supervised relocation, as the chosen method of terminating the evacuation, is the final step in the entire process, flowing from the first step taken. Its inclusion within the scope of the Executive Order, as a matter of legal interpretation, rests upon this fact.

It has been determined that the "conclusion is inescapable that Congress, by the Act of March 21, 1942, ratified and confirmed Executive Order

No. 9066." *Hirabayashi v. United States*, at p. 91. Accordingly, if appellant's detention under Public Proclamation No. 8 is within the authority granted by Executive Order No. 9066, it is also within the authority granted by the Act of March 21, 1942, even apart from possible later Congressional ratification of the measures adopted. The question remains, however, whether this construction of the Act results in an unconstitutional attempt to delegate legislative power.

In the *Hirabayashi* case this Court determined that the delegation of the authority to issue a curfew regulation pursuant to the Executive Order and the Act was not excessive because the legislative history of the statute showed "that Congress was advised that curfew orders were among those intended" (320 U. S., at 91), and because the statute therefore left to the military commanders only the power to determine whether, when, and where curfew orders should be promulgated. The legislative history does not demonstrate that detention was contemplated, however, or that Congress was advised that it was anticipated, at the time of the enactment of the statute. The exclusion was proceeding on a basis of self-arranged migration at that time (*supra*, p. 12), and Congress was advised that it was being undertaken (*Hirabayashi v. United States*, 320 U. S., at pp. 90-91). Accordingly, the detention of evacuees was ordered under the power, which Congress consciously conferred, to exclude persons

of Japanese ancestry from the West Coast and to impose conditions upon the right of persons to remain in or leave that area. We think the validity of the authority to impose the detention required by Public Proclamation No. 8 may be judged in the light of the specific measures contemplated by Congress and of the requirement that all measures taken must be directed to the prevention of espionage and sabotage, or related to measures that were so directed.

Thus construed, the standard laid down by the legislature is not less adequate than others that have been sustained even in peace time. *United States v. Grimaud*, 220 U. S. 506; *Curran v. Wallace*, 306 U. S. 1; *United States v. Rock Royal Co-op.*, 307 U. S. 533; *Sunshine Coal Co. v. Adkins*, 310 U. S. 381; *Opp Cotton Mills v. Administrator*, 312 U. S. 126. With reference to delegations of authority under the war power, standards of even greater breadth are recognized as appropriate, *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 319-322. Upon this principle, broad powers have frequently been granted to the President in wartime legislation and sustained. See, for example, *Northern Pac. Ry. Co. v. North Dakota*, 250 U. S. 135; *Dakota Cent. Tel. Co. v. South Dakota*, 250 U. S. 163; *Highland v. Russell Car Co.*, 279 U. S. 253; *The Thomas Gibbons*, 8 Cranch 421; *United States v. Chemical Foundation*, 272 U. S. 1; *Yakus v. United States*, 321 U. S. 414, 426; *Bowles v. Willingham*, 321 U. S. 503, 514-

515. In the *Chemical Foundation* case the Court states:

The Act went as far as was reasonably practicable under the circumstances existing. It was peculiarly within the province of the Commander-in-Chief to know the facts and to determine what disposition should be made of enemy properties in order effectively to carry on the war
* * * (272 U. S. at p. 12.)

In addition to the Act of March 21, 1942, Congressional approval of, and thus authorization for, detention in Relocation Centers under Public Proclamation No. 8, as well as under Executive Order No. 9102, may be reflected in the Acts appropriating funds for the War Relocation Authority (*supra*, p. 65). Congress has been fully advised of the whole program from the beginning and has acted in the light of this knowledge to enable the program to continue.

II

THE QUESTION OF WHETHER APPELLANT'S DETENTION UNDER THE REGULATIONS IS WITHIN THE JOINT WAR POWER OF CONGRESS AND OF THE PRESIDENT AND IS CONSISTENT WITH DUE PROCESS OF LAW

A. *The extent of the War Power.*—If the appellant's detention has been authorized through either or both of the Executive Orders and the Act of March 21, 1942 by reason of the foregoing considerations, its constitutionality depends upon the scope of the war power of both the Congress

and the President.⁶⁰ As was the case with the curfew regulation involved in *Hirabayashi v. United States*, the question is not the power of either the President or the Congress, acting alone, but the authority for the relocation program and the detention of evacuees in "the Constitutional power of the national government, through the joint action of Congress and the Executive" (*Hirabayashi* case, 320 U. S. at p. 92).

In the *Hirabayashi* opinion this Court stated (p. 93):

The war power of the national government * * * extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces * * * *Prize Cases*, *supra*; *Miller v. United States*, 11 Wall. 268, 303-14; *Stewart v. Kahn*, 11 Wall. 493, 506-07; *Selective Draft Law Cases*, 245 U. S. 366; *McKinley v. United States*, 249 U. S. 397; *United States v. Macintosh*, 283 U. S. 605, 622-23. Since the Constitution commits

⁶⁰ The war power of Congress rests in the main on the powers given to it by Article 1, Section 8 of the Constitution "to declare War" and "to make all Laws * * * necessary and proper for carrying into Execution" this power. The war power of the President rests on Article 2, Section 2 of the Constitution which states that "the President shall be Commander in Chief of the Army and Navy" and, generally, upon his position as Chief Executive, which necessarily entails broader duties in times of emergency than otherwise.

to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it.

And in order to assure that this wide scope for judgment and discretion is unobstructed, the Court held that if there is "any substantial basis" or any "reasonable ground" for the belief of the Executive and Legislative Departments that a matter or activity is so related to the war as substantially to affect its progress, their judgment is to be accepted by the courts.

In addition to the broad power to adopt measures to promote the progress of the war and produce a successful outcome, reaffirmed in the *Hirabayashi* decision, the war power encompasses the power to provide for the general welfare in ways which become appropriate because of the prosecution of a war. As stated by this Court in *Stewart v. Kahn*, 11 Wall. 493, in which the authority of Congress to toll state statutes of limitation during and after the Civil War was upheld, the war power not only covers measures designed to prosecute a war successfully but also "carries with it inherently the power * * * to remedy the evils which have arisen from its rise and progress." 11 Wall., at p. 507. See also *Raymond v.*

Thomas, 91 U. S. 712, 714-715, in which the Court, citing the *Stewart* case, upheld the validity of statutes providing for reconstruction governments in the Southern States following the Civil War, and *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 161, in which the Court held that a war-time enactment could be continued in force during the demobilization period, since the war power covers enactments with respect to an "emergency or necessity arising out of the war or incident to it."

It is clear from the facts stated above that the program and procedures of the War Relocation Authority have been undertaken as a result of the situation arising from the evacuation of persons of Japanese ancestry from the West Coast area. If the evacuation is upheld by this Court (*Korematsu v. United States*) as a measure validly undertaken in the prosecution of the war, conditions occasioned by it may properly be dealt with under the war power by reasonable means. A relocation problem was inescapable as a result of the evacuation. By the removal of 110,000 persons from the West Coast area the Government assumed moral and political responsibility for their fate and for the wise handling of conditions which their relocation might precipitate. It can scarcely be questioned that measures reasonably designed to meet this responsibility come within the war power. The sole question that is open is whether

the measures applicable to petitioner are so unreasonable, even under the circumstances, as to offend due process of law and, therefore, to fall outside the scope of the extraordinary powers which it was sought to exercise.

B. Due Process of Law.—The nature of the question of due process of law, involved in the present case, has already emerged from what has been said as to the relation of the leave regulations to the concluding phase of the evacuation ordered in the exercise of the war power. The validity of the requirement of cooperation on the part of appellant, as a condition of the restoration of the liberty of which she was initially deprived, cannot be negatively answered by the broad assertion that detention *per se* is violative of the Fifth Amendment except as a punishment for crime or for the prevention of criminal conduct, since the confinement of individuals may under other circumstances result from executive or administrative action with or without statutory authorization. Confinement of jurors⁶¹ and material witnesses⁶² is a well-known illustration of this type of measure. The protection of the individuals confined or of others affords adequate justification for detaining persons who are subject to some disability or condition which threatens harm.⁶³ And, of course,

⁶¹ *State v. Netherton*, 128 Kans. 564, 279 Pac. 12.

⁶² *United States v. von Bonin*, 24 F. Supp. 867 (S. D. N. Y.).

⁶³ *People ex rel. Barmore v. Robertson*, 302 Ill. 422, 134 N. E. 815.

new grounds of detention in the interest of the public welfare are recognized as expanded knowledge or changed social conditions disclose adequate reason. *Minnesota v. Probate Court*, 309 U. S. 270.

That hardships not justified in an individual case considered alone may arise from a system of detention which is valid because of larger considerations, is also a familiar fact. The arrest and confinement of persons suspected of crime but presumed to be innocent until proven guilty perhaps give rise in the course of a year to more suffering on the part of blameless individuals the country over who cannot furnish bail than the Japanese evacuees have suffered in the same length of time. See National Commission on Law Observance and Enforcement, *Penal Institutions, Probation and Parole: Report of Advisory Committee*, pp. 271-279; Hutcheson, *The Local Jail*, 21 A. B. A. J. 81 (1935). The law surrounds the exercise of public force with safeguards; but it is not required to stay its hand because irreparable hardship arises from the measures taken.

Even in emergencies short of war the public power may be exercised in ways not normally valid. *Home Building and Loan Association v. Blaisdell*, 290 U. S. 398, 425-426. In time of war

*The requirement that an arrested person be taken promptly before a magistrate is, of course, intended to minimize the danger that individuals against whom no case can be made will be subjected to prolonged detention.

its content rises to its maximum and frequently justifies measures which in normal times might not be sustained. *Meyer v. Nebraska*, 262 U. S. 390, 402; *Block v. Hirsch*, 256 U. S. 135, 150-56; *Hirabayashi v. United States*, 320 U. S. 81, 93; *Yakus v. United States*, 321 U. S. 414, 443. No severer test of its nature and scope in time of war could be suggested than that already supplied in *The Selective Draft Law Cases*, 245 U. S. 366. See also *Highland v. Russell Car Co.*, 279 U. S. 258.

This Court has sustained the detention of individuals by State executive decree to prevent disorder during an "insurrection" declared to have arisen, the civil courts being open to afford a remedy to persons seeking to question their detention. *Moyer v. Peabody*, 212 U. S. 78; cf. *Sterling v. Constantin*, 287 U. S. 378, 400. In Great Britain the two World Wars have produced legislation which, in its present form, authorizes the Secretary of State to detain "persons whose detention appears to the Secretary * * * to be in the interests of the public safety or the defence of the realm";⁶⁵ and the judges have expressed the view that such drastic action, under stress of the emergency of modern war, is not out of accord with the traditional liberty of the British subject.⁶⁶

⁶⁵ Emergency Powers (Defence) Act, Aug. 24, 1939, 2 & 3 Geo. VI, c. 62, Sec. 1 (2).

⁶⁶ See the views expressed and the authorities cited in the opinions of Lord Macmillan and Lord Wright in *Liversidge v. Sir John Anderson* [1942], A. C. 206, 251-273.

The issue now confronting the Court is not ruled by any of these precedents, although all of them suggest considerations which bear upon it. While it is to be borne in mind, in addition, that the "power to regulate must be so exercised as not, in obtaining a permissible end, unduly to infringe the protected freedom" of the individual (*Cantwell v. Connecticut*, 310 U. S. 296, 304), this principle of peacetime enunciation is not to be read with the same content as respects undue infringement when applied to unusual measures found necessary by reason of military necessity. Immunities from governmental control are less numerous and less broad. The question is whether, in view of the purposes sought to be achieved and the character of the measures taken, the leave regulations, with their attendant detention of individuals such as the appellant, can be sustained as a valid exercise of the war power or must be stricken down as a denial of due process to the persons affected.⁶⁷

⁶⁷ The difficulty of the question presented appears from the following passage in the Statement of War Mobilization Director James F. Byrnes, *supra* (p. 25) :

"Detention within a relocation center is not, therefore, a permanent part of the evacuation process. It is not intended to be more than a temporary stage in the process of relocating the evacuees into new homes and jobs.

"The detention or internment of citizens of the United States against whom no charges of disloyalty or subversiveness have been made, or can be made, for longer than the minimum period necessary to screen the loyal from the disloyal; and to provide the necessary guidance for reloca-

The reasons for the evacuation and the problems growing out of it, which have complicated the relocation problem, have been stubborn and could not be ignored by the Government. Careful procedures have been devised for the clearance of individuals from a loyalty standpoint, and an elaborate organization constructed to enable the evacuees to become reestablished as rapidly as possible, with means of self-support, in a manner deemed most helpful to the group as a whole. The program has proceeded in the face of passions aroused by the war and the inherent difficulty of relocating a large number of individuals of all ages and capacities who have been uprooted from their homes, their occupations, and their accustomed surroundings. The success of the program has been thought by the responsible officials in charge to require the knowledge that the Government was maintaining control over the evacuated population except as the release of individuals could be effected consistently with their own peace and well-being and

tion, is beyond the power of the War Relocation Authority. In the first place, neither the Congress nor the President has directed the War Relocation Authority to carry out such detention or internment. Secondly, lawyers will readily agree that an attempt to authorize such confinement would be very hard to reconcile with the constitutional rights of citizens" [Sen. Doc. No. 96, pp. 19-20].

For a similar discussion of the problem, by the Attorney General see his testimony before the Dies Committee, Hearings, Special Committee on Un-American Activities, Vol. 16, pp. 10071-10080, 78th Cong., 1st sess.

that of the nation. The demand for a program which should have this as its central feature led in the beginning to the adoption of the Relocation Centers.²⁸ Obviously the working out of the whole problem has taken time and further time is required for its completion.

The purpose of the relocation program has been to minimize the sufferings of the evacuated population. This purpose has entailed a restriction of the liberty of the individuals affected—liberty to go and come, to seek out opportunity wherever they might choose, to meet with such failure or success in the world at large as fortune and individual capacity might yield. This restriction is each day becoming less as additional persons are granted leave. The principle of restoration of the citizen's liberty has been kept constantly in mind. We do not contend that under any set of circumstances less unique or less definitely a product of an extreme war measure the Government might bestow advantage, as viewed by officials, at the price of the elementary personal freedom of individuals *sui juris*. We suggest, however, that the issue here involved must be judged in the light of its origin in a measure adopted in the course of a declared war, under a threat of invasion to which it was related—a measure, fraught with the gravest human consequences, which the Govern-

²⁸ *Supra*, pp. 25-28.

ment has striven to render as little productive of permanent harm as the forces with which it has had to cope permitted.

CONCLUSION

The program which has been begun and carried forward has not been completed. We believe there is a reasonable basis for the view that under the rare conditions which gave rise to the program the Constitution does not require abandonment of the requirement of leave application and that, in the light of the extraordinary powers invoked by reason of the war, detention pending such application is not so unreasonable or so unrelated to the causes which gave rise to it as to transcend the war power and fall under the condemnation of the Fifth Amendment.

Respectfully submitted.

CHARLES FAHY,

Solicitor General.

HERBERT WECHSLER,

Assistant Attorney General.

EDWARD J. ENNIS,

Director, Alien Enemy Control Unit.

RALPH F. FUCHS,

JOHN L. BURLING,

Department of Justice.

EDWIN E. FERGUSON,

Acting Solicitor,

War Relocation Authority.

OCTOBER 1944.

APPENDIX A

Constitution of the United States:

ARTICLE I

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; * * *

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the

Government of the United States, or in any Department or Officer thereof.

ARTICLE II

SECTION 1. The executive Power shall be vested in a President of the United States of America.

SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States;

SECTION 3. he shall take Care that the Laws be faithfully executed,

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment:

SECTION 1. All persons born or naturalized in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

APPENDIX B

•STATUTES

Declaration of War Between United States and Japan (c. 561, 55 Stat. 795):

Whereas the Imperial Government of Japan has committed unprovoked acts of war against the Government and the people of the United States of America: Therefore be it:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of war between the United States and the Imperial Government of Japan which has thus been thrust upon the United States is hereby formally declared; and the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan; and, to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States.

Approved: December 8, 1941, 4:10 p. m.,
E. S. T.

Act of March 21, 1942 (c. 191, 56 Stat. 173, 18 U. S. C. (Supp. III), Sec. 97a):

Be it enacted by the Senate and House of Representatives of the United States of

America in Congress assembled, That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$5,000 or to imprisonment for not more than one year, or both, for each offense.

Act of April 20, 1918, c. 59, 40 Stat. 533, as amended by c. 926, 54 Stat. 1220, and c. 388, 55 Stat. 655 (50 U. S. C. Secs. 104, 105):

Sec. 4. That the words "national-defense material" as used herein, shall include arms, armament, ammunition, livestock, stores of clothing, food, foodstuffs, fuel, supplies, munitions, and all other articles of whatever description and any part or ingredient thereof, intended for the use of the United States in connection with the national defense or for use in or in connection with the producing, manufacturing, repairing, storing, mining, extracting, distributing, loading, unloading, or transporting of any of the materials or other articles hereinbefore mentioned or any part of ingredient thereof.

The words "national-defense premises", as used herein, shall include all buildings,

grounds, mines, or other places wherein such national-defense material is being produced, manufactured, repaired, stored, mined, extracted, distributed, loaded, unloaded, or transported, together with all machinery and appliances therein contained; and all forts, arsenals, navy yards, camps, prisons, or other military or naval stations of the United States.

The words "national-defense utilities", as used herein, shall include all railroads, railways, electric lines, roads of whatever description, railroad or railway fixture, canal, lock, dam, wharf, pier, dock, bridge, building, structure, engine, machine, mechanical contrivance, car, vehicle, boat, or aircraft, or any other means of transportation whatsoever, whereon or whereby such national-defense material, or any troops of the United States, are being or may be transported either within the limits of the United States or upon the high seas; and all dams, reservoirs, aqueducts, water and gas mains and pipes, structures, and buildings, whereby or in connection with which water or gas may be furnished to any national-defense premises or to the military or naval forces of the United States, and all electric light and power, steam or pneumatic power, telephone and telegraph plants, poles, wires, and fixtures and wireless stations, and the buildings connected with the maintenance and operation thereof used to supply water, light, heat, power, or facilities of communication to any national-defense premises or to the military or naval forces of the United States.

SEC. 5. That whoever, with intent to injure, interfere with, or obstruct the national

defense of the United States, shall willfully injure or destroy, or shall attempt to so injure or destroy, any national-defense material, national-defense premises, or national-defense utilities, as herein defined, shall, upon conviction thereof, be fined not more than \$10,000 or imprisoned not more than ten years, or both.

APPENDIX C

EXECUTIVE ORDER No. 9066, Dated February 19,
1942, 7 F. R. 1407

AUTHORIZING THE SECRETARY OF WAR TO PRESCRIBE MILITARY AREAS

Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U. S. C. Title 50, Sec. 104):

Now, therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in.

his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restricted areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder.

EXECUTIVE ORDER No. 9102

Dated March 18, 1942, 7 F. R. 2165

ESTABLISHING THE WAR RELOCATION AUTHORITY IN THE EXECUTIVE OFFICE OF THE PRESIDENT AND DEFINING ITS FUNCTIONS AND DUTIES

By virtue of the authority vested in me by the Constitution and statutes of the United States, as President of the United States and Commander in Chief of the Army and Navy, and in order to provide for the removal from designated areas of persons whose removal is necessary in the interests of national security, it is ordered as follows:

1. There is established in the Office for Emergency Management of the Executive Office of the President the War Relocation Authority, at the

head of which shall be a Director appointed by and responsible to the President.

2. The Director of the War Relocation Authority is authorized and directed to formulate and effectuate a program for the removal, from the areas designated from time to time by the Secretary of War or appropriate military commander under the authority of Executive Order No. 9066 of February 19, 1942, of the persons or classes of persons designated under such Executive Order, and for their relocation, maintenance, and supervision.

3. In effectuating such program the Director shall have authority to— (a) Accomplish all necessary evacuation not undertaken by the Secretary of War or appropriate military commander, provide for the relocation of such persons in appropriate places, provide for their needs in such manner as may be appropriate, and supervise their activities.

(b) Provide, insofar as feasible and desirable, for the employment of such persons at useful work in industry, commerce, agriculture, or public projects, prescribe the terms and conditions of such public employment, and safeguard the public interest in the private employment of such persons.

(c) Secure the cooperation, assistance, or services of any governmental agency.

(d) Prescribe regulations necessary or desirable to promote effective execution of such program, and, as a means of coordinating evacuation and relocation activities, consult with the Secre-

tary of War with respect to regulations issued and measures taken by him.

(e) Make such delegations of authority as he may deem necessary.

(f) Employ necessary personnel, and make such expenditures, including the making of loans and grants and the purchase of real property, as may be necessary, within the limits of such funds as may be made available to the Authority.

4. The Director shall consult with the United States Employment Service and other agencies on employment and other problems incident to activities under this order.

5. The Director shall cooperate with the Alien Property Custodian appointed pursuant to Executive Order No. 9095 of March 11, 1942, in formulating policies to govern the custody, management, and disposal by the Alien Property Custodian of property belonging to foreign nationals removed under this order or under Executive Order No. 9056 of February 19, 1942; and may assist all other persons removed under either of such Executive Orders in the management and disposal of their property.

6. Departments and agencies of the United States are directed to cooperate with and assist the Director in his activities hereunder. The Departments of War and Justice, under the direction of the Secretary of War and the Attorney General, respectively, shall insofar as consistent with the national interest provide such protective, police, and investigational services as the Director shall find necessary in connection with activities under this order.

7. There is established within the War Relocation Authority the War Relocation Work Corps. The Director shall provide, by general regulations, for the enlistment in such Corps, for the duration of the present war, of persons removed under this order or under Executive Order No. 9066 of February 19, 1942, and shall prescribe the terms and conditions of the work to be performed by such Corps, and the compensation to be paid.

8. There is established within the War Relocation Authority a Liaison Committee on War Relocation which shall consist of the Secretary of War, the Secretary of the Treasury, the Attorney General, the Secretary of Agriculture, the Secretary of Labor, the Federal Security Administrator, the Director of Civilian Defense, and the Alien Property Custodian, or their deputies, and such other persons or agencies as the Director may designate. The Liaison Committee shall meet at the call of the Director and shall assist him in his duties.

9. The Director shall keep the President informed with regard to the progress made in carrying out this order, and perform such related duties as the President may from time to time assign to him.

10. In order to avoid duplication of evacuation activities under this order and Executive Order No. 9066 of February 19, 1942, the Director shall not undertake any evacuation activities within military areas designated under said Executive Order No. 9066, without the prior approval of the Secretary of War or the appropriate military commander.

11. This order does not limit the authority granted in Executive Order No. 8972 of December 12, 1941; Executive Order No. 9066 of February 19, 1942; Executive Order No. 9095 of March 11, 1942; Executive Proclamation No. 2525 of December 7, 1941; Executive Proclamation No. 2526 of December 8, 1941; Executive Proclamation No. 2527 of December 8, 1941; Executive Proclamation No. 2533 of December 29, 1941; or Executive Proclamation No. 2537 of January 14, 1942; nor does it limit the functions of the Federal Bureau of Investigation.

APPENDIX D

PUBLIC PROCLAMATION No. 1, 7 F. R. 2320

WAR DEPARTMENT

(Public Proclamation No. 1)

Headquarters Western Defense Command and
Fourth Army, Presidio of San Francisco,
California

MILITARY AREAS NOS. 1 AND 2 DESIGNATED AND
ESTABLISHED

MARCH 2, 1942.

*To: The people within the States of Arizona,
California, Oregon, and Washington, and the
Public Generally.*

Whereas by virtue of orders issued by the War Department on December 11, 1941, that portion of the United States lying within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, and the Territory of Alaska has been established as the Western Defense Command and designated as a Theatre of Operations under my command; and,

Whereas by Executive Order No. 9066, dated February 19, 1942, the President of the United States authorized and directed the Secretary of War and the Military Commanders whom he may from time to time designate, whenever he or any such designated commander deems such action

necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which the right of any person to enter, remain in or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion; and

Whereas the Secretary of War on February 20, 1942, designated the undersigned as the Military Commander to carry out the duties and responsibilities imposed by said Executive Order for that portion of the United States embraced in the Western Defense Command; and

Whereas the Western Defense Command embraces the entire Pacific Coast of the United States which by its geographical location is particularly subject to attack, to attempted invasion, by the armed forces of nations with which the United States is now at war, and, in connection therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations;

Now, therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General of the Western Defense Command, do hereby declare that:

1. The present situation requires as a matter of military necessity the establishment in the territory embraced by the Western Defense Command of Military Areas and Zones thereof as defined in Exhibit 1, hereto attached, and as generally shown on the map attached hereto and marked Exhibit 2.

2. Military Areas Nos. 1 and 2, as particularly described and generally shown hereinafter and in Exhibits 1 and 2 hereto, are hereby designated and established.

3. Within Military Areas Nos. 1 and 2 there are established Zone A-1, lying wholly within Military Area No. 1; Zones A-2 to A-99, inclusive, some of which are in Military Area No. 1, and the others in Military Area No. 2; and Zone B, comprising all that part of Military Area No. 1 not included within Zones A-1 to A-99, inclusive; all as more particularly described and defined and generally shown hereinafter and in Exhibits 1 and 2.

Military Area No. 2 comprises all that part of the States of Washington, Oregon, California and Arizona which is not included within Military Area No. 1, and is shown on the map (Exhibit 2) as an unshaded area.

4. Such persons or classes of persons as the situation may require will by subsequent proclamation be excluded from all of Military Area No. 1 and also from such of those zones herein described as Zones A-2 to A-99, inclusive, as are within Military Area No. 2.

Certain persons or classes of persons who are by subsequent proclamation excluded from the

zones last above mentioned may be permitted, under certain regulations and restrictions to be hereafter prescribed; to enter upon or remain within Zone B.

The designation of Military Area No. 2 as such does not contemplate any prohibition or regulation or restriction except with respect to the zones established therein.

5. Any Japanese, German or Italian alien, or any person of Japanese Ancestry now resident in Military Area No. 1 who changes his place of habitual residence is hereby required to obtain and execute a "Change of Residence Notice" at any United States Post Office within the States of Washington, Oregon, California and Arizona. Such notice must be executed at any such Post Office not more than five nor less than one day prior to any such change of residence. Nothing contained herein shall be construed to affect the existing regulations of the U. S. Attorney General which require aliens of enemy nationalities to obtain travel permits from U. S. Attorneys and to notify the Federal Bureau of Investigation and the Commissioner of Immigration of any change in permanent address.

6. The designation of prohibited and restricted areas within the Western Defense Command by the Attorney General of the United States under the Proclamations of December 7 and 8, 1941, and the instructions, rules and regulations prescribed by him with respect to such prohibited and restricted areas, are hereby adopted and continued in full force and effect.

The duty and responsibility of the Federal Bureau of Investigation with respect to the investigation of alleged acts of espionage and sabotage are not altered by this proclamation.

J. L. DEWITT,
Lieutenant General,
U. S. Army, Commanding.

PUBLIC PROCLAMATION No. 2

7 F. R. 2405

WAR DEPARTMENT

(Public Proclamation No. 2)

Headquarters, Western Defense Command and
Fourth Army Presidio of San Francisco,
California

ESTABLISHMENT OF MILITARY AREAS 3, 4, 5, AND 6

MARCH 16, 1942.

To: *The people within the States of Washington,
Oregon, California, Montana, Idaho, Nevada,
Utah and Arizona, and the Public Generally:*

Whereas by virtue of orders issued by the War Department on December 11, 1941, that portion of the United States lying within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona and the Territory of Alaska has been established as the West-

ern Defense Command and designated as a Theatre of Operations under my command; and

Whereas by Executive Order No. 9066, dated February 19, 1942, the President of the United States authorized and directed the Secretary of War and the Military Commanders whom he may from time to time designate, whenever he or any such designated commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which the right of any persons to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion; and

Whereas the Secretary of War on February 20, 1942, designated the undersigned as the Military Commander to carry out the duties and responsibilities imposed by said Executive Order for that portion of the United States embraced in the Western Defense Command; and

Whereas the Western Defense Command by its geographical location is particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations:

Now, therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General of the Western Defense Command, do hereby declare that:

1. The present situation requires as a matter of military necessity the establishment in the territory embraced by the Western Defense Command of Military Areas and Zones in addition to those established in Public Proclamation No. 1, this headquarters, dated March 2, 1942.

2. Pursuant to the determination and statement of military necessity in paragraph 1 hereof, there are hereby designated and established the following Military Areas:

Military Area No. 3, embracing the entire State of Idaho.

Military Area No. 4, embracing the entire State of Montana.

Military Area No. 5, embracing the entire State of Nevada.

Military Area No. 6, embracing the entire State of Utah.

3. Within Military Areas Nos. 1 and 2 as designated and established in Public Proclamation No. 1, above mentioned, and with Military Areas Nos. 3, 4, 5 and 6, as defined herein, there are hereby established, pursuant to paragraph 1 hereof, Zones A-100 to A-1033, inclusive, all as more particularly described and defined in Ex-

hibit 1, hereto attached, and as generally shown on the maps attached hereto and marked Exhibits 2, 3, 4, 5, 6, 7, 8 and 9.

4. Such persons or classes of persons as the situation may require will by subsequent proclamation be excluded from Zones A-100 to A-1033, inclusive.

The designation of Military Areas Nos. 3, 4, 5 and 6 as such does not contemplate any prohibition, regulation or restriction except with respect to the Zones established therein, and except as provided in paragraph 5 hereof.

5. Any Japanese, German, or Italian alien, or any person of Japanese ancestry now resident in the states of the Western Defense Command, namely, Washington, Oregon, California, Montana, Idaho, Nevada, Utah, and Arizona; who changes his place of habitual residence is hereby required to obtain and execute a "Change of Residence Notice" at any United States Post Office within any of the states mentioned. Such notice must be executed at any such Post Office not more than five nor less than one day prior to any such change of residence. Nothing contained herein shall be construed to affect the existing regulations of the U. S. Attorney General which require aliens of enemy nationalities to obtain travel permits from U. S. Attorneys and to notify the Federal Bureau of Investigation and the Commissioner of Immigration of any change in permanent address.

6. The duty and responsibility of the Federal Bureau of Investigation with respect to the in-

vestigation of alleged acts of espionage and sabotage are not altered by this proclamation.

J. L. DEWITT,
Lieutenant General,
U. S. Army, Commanding.

PUBLIC PROCLAMATION No. 4, 7 E. R. 2601.

Headquarters Western Defense Command and
 Fourth Army, Presidio of San Francisco,
 California

PUBLIC PROCLAMATION No. 4

MARCH 27, 1942.

*To: The people within the States of Washington,
 Oregon, California, Montana, Idaho, Nevada,
 Utah and Arizona, and the Public Generally:*

Whereas, By Public Proclamation No. 1, dated March 2, 1942, this headquarters, there was designated and established Military Area No. 1 and

Whereas, It is necessary, in order to provide for the welfare and to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from Military Area No. 1, to restrict and regulate such migration:

Now, Therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General, Western Defense Command, do hereby declare that the present situation requires as a matter of military necessity that, commencing at 12:00 midnight, P. W. T., March 29, 1942, all alien Japanese

and persons of Japanese ancestry who are within the limits of Military Area No. 1, be and they are hereby prohibited from leaving that area for any purpose until and to the extent that a future proclamation or order of this headquarters shall so permit or direct.

Any person violating this proclamation will be subject to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled: "An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing Any Act in Military Areas or Zones." In the case of any alien enemy, such person will in addition be subject to immediate apprehension and internment.

J. L. DEWITT,
Lieutenant General,
U. S. Army, Commanding:

Headquarters Western Defense Command and
Fourth Army, Presidio of San Francisco, California

PUBLIC PROCLAMATION No. 7¹

JUNE 8, 1942.

*To: The People within the States of Washington,
Oregon, California and Arizona, and the
Public Generally:*

Whereas, by Public Proclamation No. 1, dated March 2, 1942, this headquarters, there was designated and established Military Area No. 1; and

¹Public Proclamation No. 11, of August 18, 1942, similarly ratifies Civilian Exclusion Orders Nos. 100 to 108

Whereas, by Civilian Exclusion Orders Nos. 1 to 99 inclusive, this headquarters, all persons of Japanese ancestry; both alien and non-alien, were excluded from portions of Military Area No. 1; and

Whereas, the present situation requires as a matter of military necessity that all citizens of Japan and all persons of Japanese ancestry, both alien and non-alien, be excluded from all of Military Area No. 1:

Now, Therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General, Western Defense Command, do hereby declare that:

1. Civilian Exclusion Orders Nos. 1 to 99 inclusive, this headquarters, together with all exclusions and evacuations accomplished thereunder, are hereby ratified and confirmed.

2. All citizens of Japan and all persons of Japanese ancestry, both alien and non-alien, except as provided in paragraph 3 hereof, are hereby excluded from all portions of Military Area No. 1.

3: The following persons are hereby temporarily exempted or deferred from exclusion and evacuation:

and provides for the exclusion of citizens of Japan and other persons of Japanese ancestry from the California portion of Military Area No. 2. It contained the following additional provision, however:

"3. All citizens of Japan and all persons of Japanese ancestry, both alien and non-alien, except under the written authority of this headquarters, are hereby prohibited from entering Military Area No. 1 and the California portion of Military Area No. 2."

(a) Those individuals who are within the bounds of an established Wartime Civil Control Administration Assembly Center or the area of a War Relocation Authority Project, while such individuals are therein pursuant to orders or instructions of this headquarters.

(b) Those individuals who are involuntarily interned or confined in Federal, State, or local institutions and who are in the custody of Federal, State or local authorities, while such individuals are so interned or confined.

(c) Those individuals who, by written permits of this headquarters, have been heretofore or are hereafter expressly authorized to be temporarily exempted or deferred from exclusion and evacuation, subject to the terms and conditions of such permits.

4. All citizens of Japan and all persons of Japanese ancestry, both alien and non-alien, who are now in Military Area No. 1 and who are not excluded from all portions of said Area by Paragraph 2 hereof, and who are not temporarily exempted or deferred from exclusion and evacuation under Paragraph 3 hereof, shall, and they are hereby required to report in person to the nearest established Wartime Civil Control Administration Assembly Center, or, in the alternative, to the nearest Federal, State, County, or local law enforcement agency, within 8 hours from 12:00 o'clock, noon, P. W. T., June 8, 1942. Failure to so report will constitute a violation of this Proclamation.

5. Any person violating this Proclamation will be subject to the criminal penalties provided by Public Law No. 503, 77th Congress, approved

March 21, 1942, entitled: "An Act To Provide a Penalty for Violation of Restrictions or Orders With Respect to Persons Entering, Remaining in, Leaving or Committing Any Act in Military Areas or Zones," and any alien Japanese will be subject to immediate apprehension and internment.

J. L. DEWITT,
Lieutenant General,
U. S. Army, Commanding.

PUBLIC PROCLAMATION No. 8, 7 F. R. 8346

Headquarters Western Defense Command and
Fourth Army, Presidio of San Francisco, California

PUBLIC PROCLAMATION No. 8

JUNE 27, 1942.

To: The people within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, and the Public Generally:

Whereas by Public Proclamation No. 1, dated March 2, 1942, this headquarters, there were designated and established Military Areas Nos. 1 and 2, and by Public Proclamation No. 2, dated March 16, 1942, this headquarters, there were designated and established Military Areas Nos. 3, 4, 5 and 6, and

Whereas the present situation within these military areas requires as a matter of military necessity, that persons of Japanese ancestry who have been evacuated from certain regions within Military Areas Nos. 1 and 2 shall be removed to Relocation Centers for their relocation, mainte-

nanice and supervision and that such Relocation Centers be designated as War Relocation Project Areas and that appropriate restrictions with respect to the rights of all such persons of Japanese ancestry, both alien and non-alien, so evacuated to such Relocation Centers, and of all other persons to enter, remain in, or leave such areas be promulgated:

Now, Therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General of the Western Defense Command, do hereby declare that:

1. Pursuant to the determination of military necessity hereinbefore set out, all the territory included within the exterior boundaries of each Relocation Center now or hereafter established within the Western Defense Command, as such boundaries are designated and defined by orders subsequently issued by this headquarters, are hereby designated and established as War Relocation Project Areas.

2. All persons of Japanese ancestry, both alien and non-alien, who now or shall hereafter be or reside, pursuant to exclusion orders and instructions from this headquarters, or otherwise, within the bounds of any established War Relocation Project Area are required to remain within the bounds of such War Relocation Project Area at all times unless specifically authorized to leave as set forth in Paragraph 3 hereof.

3. Any person of Japanese ancestry, both alien and non-alien, who shall now or hereafter so be or reside within any such War Relocation Project Area shall, before leaving said Area, obtain a written authorization executed by or pursuant to the express authority of this headquarters setting forth the effective period of said authorization and the terms and conditions upon and purposes for which it has been granted.

4. No persons other than the persons of Japanese ancestry described in Paragraph 2 hereof, and other than persons employed by the War Relocation Authority established by Executive Order No. 9102, dated March 18, 1942, shall enter any such War Relocation Project Area except upon written authorization executed by or pursuant to the express authority of this headquarters first obtained, which said authorization shall set forth the effective period thereof and the terms and conditions upon and purposes for which it has been granted.

5. Failure of persons subject to the provisions of this Public Proclamation No. 8 to conform to the terms and provisions thereof shall subject such persons to the penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled "An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving, or Committing any Act in Military Areas or Zones."

J. L. DEWITT,
Lieutenant General,
U. S. Army, Commanding.

PUBLIC PROCLAMATION NO. WD 1

WAR DEPARTMENT,

Washington, August 13, 1942.

To: The People within the States of Arkansas, Colorado, and Wyoming, and the Public Generally:

Whereas, by Executive order No. 9066, dated February 19, 1942, the President of the United States authorized and directed the Secretary of War, whenever he deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he may determine, from which any or all persons may be excluded, and with respect to which the right of any person to enter, remain in or leave shall be subject to whatever restrictions the Secretary of War may impose in his discretion; and

Whereas, the United States has been subjected to attacks and attempted invasion by the armed forces of nations with which the United States is now at war, and in connection therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations emanating from within as well as from without the national boundaries; and

Whereas, the present situation requires as a matter of military necessity that persons of Japanese ancestry who have been evacuated from certain regions of the United States shall be removed to Relocation Centers for their relocation, maintenance and supervision in War Relocation Projects and further requires the promulgation of appropriate restrictions regulating and controlling

the rights of all such persons of Japanese ancestry, both alien and non-alien, so evacuated to such Relocation Centers, and of all other persons to enter, remain in, or leave such areas;

Now, therefore, I, Henry L. Stimson, Secretary of War, by virtue of the authority vested in me by the President of the United States, and my powers and prerogatives as Secretary of War, do hereby declare that:

1. Pursuant to the determination of military necessity hereinbefore set out, all the territory within the established boundaries of Heart Mountain Relocation Project, approximately twelve miles northeast of Cody, Wyoming; Granada Relocation Project, approximately two miles southwest of Granada, Colorado; Jerome Relocation Project, approximately one mile northeast of Jerome, Arkansas; and Rohwer Relocation Project, adjacent to and west of Rohwer, Arkansas, are hereby established as Military Areas, and are designated as War Relocation Project Areas.

2. All persons of Japanese ancestry and all members of their families, both alien and non-alien, who now or shall hereafter be or reside, pursuant to orders and instructions of the Secretary of War, or pursuant to the orders or instructions of the Commanding General, Western Defense Command and Fourth Army, or otherwise, within the bounds of any of the said War Relocation Project Areas are required to remain within the bounds of said War Relocation Project Areas at all times unless specifically authorized to leave as set forth in Paragraph 3 hereof.

3. Any person of Japanese ancestry and any member of his family, whether alien or nonalien,

who shall now or hereafter be or reside within any of said War Relocation Project Areas, before leaving any of said Areas, shall obtain a written authorization executed by or pursuant to the express authority of the Secretary of War or the Director, War Relocation Authority, setting forth the effective period of said authorization and the terms and conditions upon and purposes for which it has been granted.

4. No persons other than the persons of Japanese ancestry and members of their families described in Paragraph 2 hereof, other than military personnel on duty at a given War Relocation Project, and other than persons employed by the War Relocation Project, established by Executive Order No. 9102, dated March 18, 1942, shall enter such War Relocation Project Areas except upon written authorization executed by or pursuant to the express authority of the Secretary of War or the Director, War Relocation Authority, first obtained, which said authorization shall set forth the effective period thereof and the terms and conditions upon and purposes for which it has been granted.

5. Failure of persons subject to the provisions of this Public Proclamation No. WD 1 to conform to the terms and provisions thereof shall subject such persons to the penalties provided by Public Law No. 303, 77th Congress approved March 21, 1942, entitled "An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving, or Committing any Act in Military Areas or Zones."

HENRY L. STIMSON,
Secretary of War.

CIVILIAN RESTRICTIVE ORDER No. 1

WAR DEPARTMENT

8 F. R. 982

(Civilian Restrictive Order 1)

PERSONS OF JAPANESE ANCESTRY—PROCEDURE FOR
DEPARTURE FROM ASSEMBLY CENTERS, ETC.

MAY 19, 1942.

Headquarters Western Defense Command and
Fourth Army, Office of the Commanding Gen-
eral, Presidio of San Francisco, California

1. Pursuant to the provisions of Public Pro-
clamations Nos. 1 and 2, this headquarters, dated
March 2, 1942, and March 16, 1942, respectively:
It is hereby ordered, that all persons of Japanese
ancestry, both alien and non-alien, who now, or
shall hereafter reside, pursuant to exclusion orders
and instructions from this headquarters, within
the bounds of established assembly centers, recep-
tion centers or relocation centers, as such bounds
are designated on the ground by boundary signs in
each case, shall during the period of such resi-
dence be subject to the following regulations:

(a) All such persons are required to remain
within the bounds of assembly centers, reception
centers or relocation centers at all times unless
specifically authorized to leave as set forth in
paragraph (b) hereof.

(b) Any such person, before leaving any of
these centers, must first obtain a written authori-
zation executed by or pursuant to the express
authority of this headquarters setting forth the

hour of departure and the hour of return and the terms and conditions upon which said authorization has been granted.

2. Any person subject to this order who fails to comply with any of its provisions or with the provisions of published instructions pertaining hereto will be liable to the penalties and liabilities provided by law.

J. L. DEWITT,
Lieutenant General,
U. S. Army, Commanding.

Headquarters Western Defense Command and
 Fourth Army, Presidio of San Francisco, Cali-
 fornia, May 7, 1942

CIVILIAN EXCLUSION ORDER No. 52

1. Pursuant to the Provisions of Public Proclamations Nos. 1 and 2, this Headquarters, dated March 2, 1942, and March 16, 1942, respectively, it is hereby ordered that from and after 12 o'clock noon, P. W. T., of Saturday, May 16, 1942, all persons of Japanese ancestry, both alien and non-alien, be excluded from that portion of Military Area No. 1 described as follows: All of the City of Sacramento, State of California.

2. A responsible member of each family, and each individual living alone, in the above described area will report between the hours of 8:00 A. M. and 5:00 P. M., Friday, May 8, 1942, or during the same hours on Saturday, May 9, 1942, or Sunday, May 10, 1942, to the Civil Control Station located at: Civic Memorial Auditorium, Fifteenth and I Streets, Sacramento, California.

3. Any person subject to this order who fails to comply with any of its provisions or with the provisions of published instructions pertaining hereto or who is found in the above area after 12 o'clock noon, P. W. T., of Saturday, May 16, 1942, will be liable to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled "An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing any Act in Military Areas or Zones," and alien Japanese will be subject to immediate apprehension and internment.

4. All persons within the bounds of an established Assembly Center pursuant to instructions from this Headquarters are excepted from the provisions of this order while those persons are in such Assembly Center.

J. L. DEWITT,
Lieutenant General,
U. S. Army, Commanding.

C. E. Order 52

Western Defense Command and Fourth Army
 Wartime Civil Control Administration, Presidio
 of San Francisco, California

INSTRUCTIONS TO ALL PERSONS OF JAPANESE
 ANCESTRY LIVING IN THE FOLLOWING AREA: ALL
 OF THE CITY OF SACRAMENTO, STATE OF CALI-
 FORNIA

Pursuant to the provisions of Civilian Exclusion Order No. 52, this Headquarters, dated May

7, 1942, all persons of Japanese ancestry, both alien and nonalien, will be evacuated from the above area by 12 o'clock noon, P. W. T., Saturday, May 16, 1942.

No Japanese person living in the above area will be permitted to change residence after 12 o'clock noon, P. W. T., Thursday, May 7, 1942, without obtaining special permission from the representative of the Commanding General, Northern California Sector, at the Civil Control Station located at Civic Memorial Auditorium, Fifteenth and I Streets, Sacramento, California.

Such permits will only be granted for the purpose of uniting members of a family, or in cases of grave emergency.

The Civil Control Station is equipped to assist the Japanese population affected by this evacuation in the following ways:

1. Give advice and instructions on the evacuation.
2. Provide services with respect to the management, leasing, sale, storage or other disposition of most kinds of property, such as real estate, business and professional equipment, household goods, boats, automobiles and livestock.
3. Provide temporary residence elsewhere for all Japanese in family groups.
4. Transport persons and a limited amount of clothing and equipment to their new residence.

The following instructions must be observed:

1. A responsible member of each family, preferably the head of the family, or the person in whose name most of the property is held, and each individual living alone, will report to the Civil Control Station to receive further instructions. This

must be done between 8:00 A. M. and 5:00 P. M. on Friday, May 8, 1942, or between 8:00 A. M. and 5:00 P. M. on Saturday, May 9, 1942, or between 8:00 A. M. and 5:00 P. M. on Sunday, May 10, 1942.

2. Evacuees must carry with them on departure for the Assembly Center, the following property:

(a) Bedding and linens (no mattress) for each member of the family;

(b) Toilet articles for each member of the family;

(c) Extra clothing for each member of the family;

(d) Sufficient knives, forks, spoons, plates, bowls and cups for each member of the family;

(e) Essential personal effects for each member of the family.

All items carried will be securely packaged, tied and plainly marked with the name of the owner and numbered in accordance with instructions obtained at the Civil Control Station. The size and number of packages is limited to that which can be carried by the individual or family group.

3. No pets of any kind will be permitted.

4. No personal items and no household goods will be shipped to the Assembly Center.

5. The United States Government through its agencies will provide for the storage, at the sole risk of the owner, of the more substantial household items, such as iceboxes, washing machines, pianos and other heavy furniture. Cooking utensils and other small items will be accepted for storage if crated, packed and plainly marked with the name and address of the owner. Only one name and address will be used by a given family.

6. Each family, and individual living alone, will be furnished transportation to the Assembly Center or will be authorized to travel by private automobile in a supervised group. All instructions pertaining to the movement will be obtained at the Civil Control Station.

Go to the Civil Control Station between the hours of 8:00 A. M. and 5:00 P. M., Friday, May 8, 1942; or between the hours of 8:00 A. M. and 5:00 P. M., Saturday, May 9, 1942, or between the hours of 8:00 A. M. and 5:00 P. M., Sunday, May 10, 1942, to receive further instructions.

J. L. DEWITT,
Lieutenant General,
U. S. Army, Commanding.

MAY 7, 1942.

See Civilian Exclusion Order No. 52.

APPENDIX E

REGULATIONS OF THE WAR RELOCATION AUTHORITY

Excerpts From Regulations of September 26, 1942, Governing Issuance of Leave for Departure From a Relocation Area (7 F. R. 7656)

Pursuant to the provisions of Executive Order No. 9102 of March 18, 1942, the following regulations are hereby prescribed:

* * * * *

§ 5.1. *Types of leave.*—Leaves are of the following types:

(a) A short term leave, for not more than thirty days, for attending to affairs requiring the applicant's presence outside the relocation area;

(b) A leave to participate in a work group, for employment and residence with a group of center residents outside the relocation area, or for such employment with residence remaining within the relocation area; and

(c) An indefinite leave, for employment, education or indefinite residence outside the relocation area.

§ 5.2. *Application for leave.*—Any person residing within a relocation center who has been evacuated from a military area or who has been specifically accepted by the War Relocation Authority for residence within a center may apply for leave.

§ 5.3. *Proceedings upon application for leave.*—

(a) The Project Director may interview an ap-

applicant for leave, shall secure a completed individual record on form WRA-26 for the applicant, and shall secure such further information concerning the applicant and the proposed leave as may be available at the relocation center.

* * * * *

(d) The file on each application for indefinite leave, which shall include the application, all related papers, and the Project Director's findings and recommendations, shall be forwarded by the Project Director to the Director. * * *

(e) In the case of each applicant for indefinite leave, the Director, upon receipt of such file from the Project Director, will secure from the Federal Bureau of Investigation such information as may be obtainable, and will take such steps as may be necessary to satisfy himself concerning the applicant's means of support, his willingness to make the reports required of him under the provisions of this part, the conditions and factors affecting the applicant's opportunity for employment and residence at the proposed destination, the probable effect of the issuance of the leave upon the war program and upon the public peace and security, and such other conditions and factors as may be relevant. The Director will thereupon send instructions to the Project Director to issue or deny such leave in each case, and will inform the Regional Director of the Instructions so issued. The Project Director shall issue indefinite leaves pursuant to such instructions.

(f) A leave shall issue to an applicant in accordance with his application in each case, subject to the provisions of this part and under the procedures herein provided, as a matter of right.

where the applicant has made arrangements for employment or other means of support, where he agrees to make the reports required of him under the provisions of this Part and to comply with all other applicable provisions hereof, and where there is no reasonable cause to believe that applicant cannot successfully maintain employment and residence at the proposed destination, and no reasonable ground to believe that the issuance of a leave in the particular case will interfere with the war program or otherwise endanger the public peace and security.

(g) The Director, the Regional Director, and the Project Director may attach such special condition to the leave to be issued in a particular case as may be necessary in the public interest. The special conditions to be so attached shall be governed by regulations or instructions issued from time to time. Every leave issued under the provisions of this Part shall state the conditions that are applicable thereto.

(1) The Project Director shall promptly notify the Regional Director and the Director of the names of any persons who have failed to return to the relocation center upon expiration of leave.

§ 5.5 *Transportation and reports during leave.*—

(a) The Project Director shall provide transportation for the applicant to whom a leave has been issued to the most convenient railroad or bus station. All other necessary transportation shall be arranged for by the applicant and shall not be paid for by the War Relocation Authority. The Authority may, however, make arrangements with

employers for transportation connected with group work leave. * * *

(b) * * * Every indefinite leave shall require the person to whom such a leave has been issued to report his arrival, his business or school and residential addresses, and every change of address, to the Director. Reports of changes of addresses shall be required to be made, so far as possible, before leaving any employment, institution or address. The person to whom an indefinite leave has been issued shall further be required to report upon arrival at a new location, and to transmit any further appropriate information concerning his exact business, school and residence addresses promptly upon ascertaining them. The Project Director shall send to the Director reports of all such information received by him.

* * *
 § 5.8. *Restrictions on leave.*— * * *

(b) An indefinite leave may permit travel unlimited except as to restrictions imposed by military authorities with reference to military areas or zones, or may permit only travel within designated states, counties, or comparable areas.

(c) Whenever the military authorities of the United States require a pass or other authorization to enter any designated area, no leave shall be issued under the provisions of this part to permit entry into such area until the required pass or authorization has been obtained for the applicant. Whenever such military authorities impose restrictions on movement or conduct within any area, the continuance of such leave shall be contingent upon the observance of any such re-

strictions in addition to the observance of the other conditions of such leave.

§ 5.9: *Expiration of leave and furlough.*—(a) Any leave issued, and the furlough granted in connection therewith, under the provisions of this part shall expire:

(1) On the expiration date stated in the leave; or

(2) At any time that the person to whom the leave has been issued shall violate any of the conditions applicable to such leave; or

(3) Upon notice from the Director or Project Director that the leave is revoked pursuant to the provisions of paragraph (b) of this section.

(b) The Director may revoke any leave when conditions are so far changed; or when such additional information has become available, that an original application by such person for leave would be denied under the provisions of this part. The Project Director may, on similar ground with the prior approval of the Regional Director, revoke any short term leave. When the Director shall revoke a leave, he will promptly notify the Regional Director and the Project Director. When a Project Director shall revoke a leave, he shall promptly notify the Director and the Regional Director.

(c) Upon the expiration of any leave issued under this part, the person to whom the leave was issued shall return to the relocation center in which he previously resided unless new leave has been granted or unless he is otherwise directed by the Director.

Excerpts From Revised Regulations of War Relocation Authority, Dated January 1, 1944 (9 F.R. 154)

Pursuant to the provisions of Executive Order No. 9102 of March 18, 1942, Part 5, Chapter I, Title 32 of the Code of Federal Regulations is hereby revised to read as follows:

SEC. 5.1. *Types of leave.*—Leaves are of the following types:

(a) A short term leave, for not more than sixty days, for attending to affairs requiring the applicant's presence outside the relocation area;

(b) A seasonal work leave, for seasonal employment and residence outside the relocation area; and

(c) An indefinite leave, for indefinite employment, education, or residence outside the relocation area.

SEC. 5.2. *Application for leave.*—Any person residing within a relocation center who has been evacuated from a military area or who has been specifically accepted by the War Relocation Authority for residence within a relocation center may apply for leave. No such person shall depart from a relocation area before receiving leave.

SEC. 5.3. *Proceedings upon application for leave.*—(a) Short term leaves, seasonal work leaves, and indefinite leaves may be issued by the Project Director in accordance with the provisions of this part, as supplemented by instructions issued by the Director from time to time.

(b) Except as may otherwise be determined by the Director, every person eligible to apply for

leave who is 17 years of age or older shall file an application for leave clearance before he shall be eligible for leave. After such investigation as may be prescribed by instructions issued by the Director, the Project Director shall forward the application to the Director with his recommendations. The Director will secure from the Federal Bureau of Investigation such information as may be obtainable and will take such additional steps as may be necessary to determine the probable effect of the issuance of indefinite leave to the applicant upon the war program and upon the public peace and security. The Director will thereupon approve or disapprove the application and instruct the Project Director accordingly. A person whose application for leave clearance is disapproved shall be ineligible to receive indefinite leave and shall be transferred to the Tule Lake Center in northern California. A person resident at the Tule Lake Center whose application for leave clearance is approved shall be transferred to another center.

(c) Indefinite leave may be issued prior to approval of an application for leave clearance only in accordance with instructions issued by the Director from time to time. In the case of each application for indefinite leave, the Director will cause such steps to be taken as may be necessary to satisfy himself concerning the applicant's willingness to make the reports required of him under the provisions of this Part, his means of support, the conditions and factors affecting his successful maintenance of residence at the proposed destination, the probable effect of the issuance of the leave upon the war program and upon the public

peace and security, and such other conditions and factors as may be relevant. The Director will issue instructions covering the issuance or denial of indefinite leave in each such case. The Project Director shall issue or deny indefinite leaves pursuant to such instructions.

(d) A leave shall issue to an applicant in accordance with his application in each case, subject to the provisions of this Part and under the procedures herein provided, as a matter of right, where the applicant agrees to make the reports required of him under the provisions of this Part and to comply with all applicable provisions hereof, where there is no reasonable cause to believe that he will not have employment or other means of support or that he cannot otherwise successfully maintain residence at the proposed destination, and where there is no reasonable cause to believe that the issuance of leave in the particular case will interfere with the war program or otherwise endanger the public peace and security.

(e) Such special conditions may be attached to the leave to be issued in a particular case as may be necessary in the public interest. The special conditions to be so attached shall be governed by instructions issued from time to time. Every leave issued under the provisions of this Part shall state the conditions that are applicable thereto.

(f) The Project Director shall promptly notify the applicant of the approval or disapproval of an application for leave or leave clearance, and of any special conditions attached to the approval of

an application for leave, with a statement of the reasons therefor. In the case where the application for leave has been disapproved, or has been approved subject to special conditions, the Project Director shall advise the applicant of his right to appeal under the provisions of Sec. 5.4.

* * * *

(h) The Project Director shall promptly notify the Director of the names of any persons who have failed to return to the relocation center upon expiration of leave.

* * * *

SEC. 5.5. Leave Assistance; reports during leave.

(a) The Project Director shall provide transportation for the applicant to whom a leave has been issued to the most convenient railroad or bus station. Assistance in meeting transportation costs to destination and initial subsistence expenses may be provided, in accordance with instructions issued by the Director from time to time, to persons to whom indefinite leave has been granted.

(b) * * * Each applicant for indefinite leave shall be required to agree to notify the Director promptly of his arrival at destination, his business or school and residential addresses, and all subsequent changes in school, employment, or residence.

* * * *

SEC. 5.7. Restrictions on leave. — * * *

* * *

(b) An indefinite leave may permit travel unlimited except as to restrictions imposed by mili-

tary authorities with reference to military areas or zones, or may permit only travel within designated states, counties, or comparable areas.

(c) Whenever the military authorities of the United States require a pass or other authorization to enter any designated area, no leave shall be issued under the provisions of this Part to Permit entry into such area until the required pass or authorization has been obtained for the applicant. Whenever such military authorities impose restrictions on movement or conduct within the area, the continuance of such leave shall be contingent upon the observance of any such restrictions in addition to the observance of the other conditions of such leave.

SEC. 5.8. *Expiration of leave.*—(a) Any leave issued under the provisions of this Part shall expire:

(1) On the expiration date stated in the leave; or

(2) On the return to a relocation center, as a resident, of the person to whom the leave has been issued; or

(3) At any time that the person to whom the leave has been issued shall violate any of the conditions applicable to such leave; or

(4) On notice from the Director, the Project Director, or the Relocation Supervisor that the leave is revoked pursuant to the provisions of paragraph (b) of this section.

(b) The Director may revoke any leave when conditions are so far changed, or when such additional information has become available, that an

original application by such person for leave would be denied under the provisions of this Part. The Project Director may revoke any short term leave and the Relocation Supervisor may revoke any seasonal work leave on similar grounds. When the Project Director or Relocation Supervisor revokes a leave he shall promptly notify the Director.

APPENDIX F

RULES OF PROCEDURE AND FORMS OF WAR RELOCATION AUTHORITY

WAR RELOCATION AUTHORITY'S ADMINISTRATIVE INSTRUCTION NO. 22

WAR RELOCATION AUTHORITY,
WASHINGTON, *July 20, 1942.*

Administrative Instruction No. 22

Subject: Temporary procedure for issuance of permits to individuals or single families to leave relocation centers for employment outside such centers and the Western Defense Command.

This Instruction applies only to the issuance of permits to individuals or single families to leave relocation centers for employment outside such centers and outside the Western Defense Command. It does not apply to such outside employment for groups of evacuees; in the case of such groups, present procedures may continue to be followed.

The program of outside employment will be further developed as we accumulate experience.

1. Any American citizen of Japanese ancestry within a relocation center, who has never at any time resided or been educated in Japan, may apply to the Project Director for a permit to leave the

center for employment outside the center and outside the Western Defense Command.

2. The applicant for a permit must show that he has a specific job opportunity with a prospective employer at a designated place outside the relocation center and outside the Western Defense Command. If the applicant has dependents, he must state what arrangements will be made for the dependents who are to accompany him and for those who are to remain in the center. Preference will be given by the Director to applications for leave to accept employment within the Middle West.

3. The Project Director will promptly investigate as thoroughly as practicable each applicant who applies for a permit, through interviews with the applicant and those who know him or have information about him, and by other suitable means. The Project Director will then forward to the Regional Director the application and all related papers, * * *

4. The Regional Director, upon receipt of an application for a permit, will obtain from the Federal Bureau of Investigation any information or record it can supply regarding the applicant or his family, and will make such further investigation in connection with the application as may be necessary. The Regional Director will then forward to the Director the application and all related papers, together with a full report of his findings and recommendations thereon.

5. Each application for a permit will be approved or disapproved by the Director. * * *

6. When the Project Director is advised of the approval of an application for a permit, he will

issue a permit to the applicant. The permit will show * * * any special conditions upon which the permit is issued; will state that the permittee is required to notify the Director of the War Relocation Authority of any change of employer or change of address * * *

9. Every applicant issued a permit pursuant to this Instruction, and his accompanying dependents, will remain in the constructive custody of the military commander in whose jurisdiction lies the relocation center in which the applicant resides at the time the permit is issued. Any such permit may be revoked at any time upon the order of the Director, and the applicant and any dependents accompanying him may be required to return to the relocation center or such other place as the Director specifies, if the Director shall find such revocation to be necessary in the public interest.

10. This Instruction applies only to relocation centers which have been designated military areas pursuant to Executive Order No. 9066 of February 19, 1942.

(S) D. S. MYER, *Director*

Excerpts from War Relocation Authority's Administrative Instruction No. 22, Revised, issued November 6, 1942

I. INTRODUCTION

A. *Statement of Purpose.*—The issuance of leave for departure from a relocation area is governed by the regulations issued by the Director

on that subject, published in the Federal Register, September 29, 1942, title 32, c. 1, pt. 5. This Administrative Instruction is issued for the purpose of specifying in greater detail the procedure to be followed under those regulations. This Instruction does not alter the regulations. All administrative action with reference to leave shall be taken with due regard to both the regulations and this Instruction.

* * * * *

IV. INDEFINITE LEAVE

A. *Execution of Application.*—Unless an applicant for an indefinite leave has already executed Form WRA-126, for leave clearance, he shall be required to execute that form in duplicate in connection with his application for indefinite leave.

* * * * *

D. *Transmission of Application to Director.*—When the Project Director is satisfied that the file of the case contains all the relevant information more accessible from the project than from Washington, he shall transmit to the Director the application for indefinite leave, Form WRA-130, and the project investigation record.

* * *

E. *Director's Investigation and Ruling.*—The Director, upon receipt of such file from the Project Director or the employment investigator, will investigate the applicant's prospective employment or other means of support and the conditions and factors affecting the applicant's proposed residence. If the applicant has not previously obtained leave clearance, the Director will conduct the further investigation described in Section V, Paragraph G of this Instruction.

Where a considerable time has elapsed since the applicant secured a leave clearance, the Director will take such measures as he deems appropriate to bring down-to-date the investigation pertinent thereto.

V. LEAVE CLEARANCE

A. Application.—An application for leave clearance * * * must be filed, either before or simultaneously with, an application for indefinite leave or an application for leave to participate in a work group. Any evacuee wishing to obtain leave clearance and have his references checked, so that a subsequent application for leave of any type may be expeditiously processed, may file an application for leave clearance. * * *

B. Examination of Applicant.—Upon the execution of the application for leave clearance, Form WRA-126, the Project Director shall interview the applicant, shall elicit any information necessary to check or to complete the answers, and shall complete and correct the answers accordingly. He shall pursue any further line of questions that seem pertinent if he has any doubt concerning the frankness of the intentions of the applicant. Any further pertinent information elicited suitable for certification by the applicant's signature shall be written on to the form or stapled thereto. If sheets in addition to the printed form are used, the applicant shall be asked to sign those sheets separately. Separate applications shall be filed and fully processed for applicant's wife and for each dependent 17 years

of age or over whom it is proposed to have accompany the applicant.

C. Investigation on Project.—The Project Director shall make such further investigation as may be practical to verify and supplement at the project the information supplied by the applicant. This shall include a check with the Internal Security Officer of the project and may include interviews with any reference the applicant gives and interviews with persons with or for whom the applicant has worked, so far as any of such references or other people are on or accessible from the project for personal interviews. He shall send out to all other references given by the applicant a franked envelope addressed to the Director in Washington and a form letter, WRA-138, which requests a reply to be sent to the Director in Washington. He shall embody in a project investigation record any material information not certified by the applicant's signature.

D. Recommendations by Project Director.—The Project Director shall then recommend the disposition to be made of the application for leave clearance—which may be either allowed, disallowed, or allowed with special conditions. Unless he deems the applicant entitled to clearance without doubt, he shall state reasons for the recommendation made. It will be recognized that in many instances these recommendations will be made upon only incomplete evidence, but they are to be recorded for consideration with such evidence as may be developed by subsequent investigation. These reasons may be stated briefly or

at length, according to the circumstances, but in any case the significant facts shall be referred to and identified by their location on Form WRA-126 or by the page number of the project investigation record.

E. Investigation Outside Project.—When the case suggests a need for further investigation concerning particular matters, such as addresses, ship manifests, or organizations, which cannot be investigated on the project, the project investigation record shall call particular attention to these matters and shall list them together with any available leads for further investigation.

F. Transmission of Papers.—When the Project Director is satisfied that the file on the application contains all the relevant information more accessible from the project than from Washington, he shall transmit the Individual Record, Form WRA-26, in quadruplicate, and one copy of the application for leave clearance, the project investigation record, and his findings and recommendations, to the Director. He shall retain a copy of these papers. At the same time, he shall send the Regional Director a copy of applicant's Form WRA-26 and a statement of the recommendation made by him. When an applicant is likely to be accompanied by members of his family or other dependents, 17 years of age or older, a full set of such papers shall be transmitted for each such family member or dependent. Forms WRA-26 for children under seventeen should accompany Form WRA-126, whenever possible. If they do not accompany Form WRA-126 they shall be transmitted along with an application for indefinite leave as specified in Section IV, Paragraph D.

Q. Director's Investigation and Ruling.—The Director, upon receipt of such file from the Project Director or employment investigator, will secure from the Department of Justice such information as may be obtainable, will examine any letters received from applicant's references, and will take such steps as may be necessary to satisfy himself concerning the probable effect upon the war program and upon the public peace and security of issuing indefinite leave to applicant. The Director will thereupon instruct the Project Director whether applicant is eligible to be entered upon the register of those cleared for indefinite leave, and whether any special conditions are to attach to any leave issued pursuant to such clearance, and will inform the Regional Director of such instructions in each case. The Director will further advise the Project Director of the reasons for denying such clearance or for directing that such conditions attach to any leaves issued pursuant thereto. He will assign such reason or reasons in the language of paragraph 5.3 (f) of the leave regulations.

Excerpts from War Relocation Authority's Handbook on Issuance of Leave for Departure from a Relocation Center issued July 20, 1943

Statement of Purpose

60.1. The issuance of leave for departure from a relocation area is governed by the regulations issued by the Director on that subject, published in the Federal Register, September 29, 1942, title

32, c. 1, pt. 5, as amended. This Handbook is issued for the purpose of specifying in greater detail the procedure to be followed under those regulations. This Handbook does not alter the regulations. All administrative action with reference to leave shall be taken with due regard to both the regulations and this Handbook.

* * * * *

60.4.3. In cases where the applicant meets the following eligibility requirements:

A. He has previously received leave clearance pursuant to an application filed either on DSS Form 304A and Form WRA-126a, or on Form WRA-126, Revised (notice of such leave clearance will be given on Forms WRA-258, 258a, and 258b), and the Project Director believes there is no need for the Director to bring the leave clearance investigation down to date, * * *

* * * * *

The Project Director, without further authority from the Director, may issue the leave on the appropriate form (WRA-137, WRA-137a, or WRA-138) under any one of the following circumstances;

C. The applicant proposes to accept an employment offer or offer of support that has been referred to the Project Director by a Relocation Officer, or that has been investigated and approved by a Relocation Officer at the request of the Project Director.

D. The applicant does not intend to work, but has adequate financial resources to take care of himself and a Relocation Officer has investigated

and approved public sentiment at his proposed destination.

E. The applicant has made arrangements to live at a hotel or in a private home approved by a Relocation Officer while arranging for employment.

F. The applicant proposes to go to a given area pursuant to a notice from the Relocation Officer to the Project Director to the effect that the Relocation Officer can place a certain number of evacuees in a given area within a given time. This notice will describe the types of jobs that are available, including all pertinent information relating to wages, housing, cost of living, and community relations affecting evacuees. Relocation Officers shall take care not to encourage several projects to send competing groups for the same positions and it shall be the duty of Project Directors to notify the Relocation Officer of any and all leaves contemplated in response to such a notice of vacancies, in order that the Relocation Officer may keep the supply adjusted to the demand for evacuees.

* * * *

H. The applicant proposes to accept an employment offer by a Federal, State, or local governmental agency.

I. The applicant proposes to attend a college, university, or professional school on the approved list, has evidence (obtained through the National Student Relocation Council or otherwise) that he has been admitted to the school, and has sufficient funds or a reasonably certain opportunity for part

time employment to enable him to finish one quarter or semester of work. Leave may be granted under this subparagraph only if the applicant has received leave clearance pursuant to a notice from the Director on Form WRA-258a or 258b indicating that the application has been considered by the Japanese-American Joint Board in the Provost Marshall General's Department.

J. The applicant is a parent going to live with a son or daughter.

K. The applicant is a son or daughter going to live with one or both parents.

L. The applicant is a wife going to live with her husband, or is a husband going to live with his wife.

M. The applicant is going to live with a brother or sister.

N. The applicant is a dependent going to live with a person who will support him.

O. The applicant proposes to marry a person living outside a Relocation Center and live with him or her, as the case may be.

P. The applicant is away from the project on seasonal work leave and has been recommended by the appropriate Relocation Officer for indefinite leave (see Section 60.7.3). It is not necessary for the applicant to show that he has made arrangements for employment at his destination.

No leave shall be issued under the provisions of this paragraph to an applicant whose proposed place of residence or employment is within the Eastern Defense Command unless leave clearance has been approved by the Director on Forms WRA-258a or WRA-258b, or unless the notice of

leave clearance specifically authorizes entry into the Eastern Defense Command.

No conditions shall be attached to the leave so issued unless they have previously been approved by the Director. When issuing the indefinite leave under Paragraphs G through N above, it shall be the responsibility of the Project Director to determine that the applicant has employment or other means of support at his destination, and the applicant should be informed that no check has been made of local sentiment at his destination. If the applicant wants such check to be made, the Project Director shall ask the appropriate Relocation Officer to make it. When an indefinite leave is issued under this paragraph, the Project Director shall immediately send to the Director in accordance with Section 60.4.5 of this Handbook, a copy of Form WRA-130 completely filled out with the notation: "Indefinite leave has been issued under Section 60.4.3, Paragraph -, of the Administrative Handbook on Issuance of Leave." If the Director should subsequently deny an application for leave clearance by an applicant who has been granted indefinite leave under the provisions of this paragraph, appropriate instructions with respect to the indefinite leave will be issued to the Project Director. If the Project Director should receive a notice that, leave clearance has been denied without such instructions, he shall request them by wire.

* * * * *

Transmission of Application to Director

60.5. Whether or not a case is within the special provisions of Section 60.4.3 or 60.4.4, the

Project Director, when satisfied that the file of the case contains all the relevant information more accessible from the project than from Washington, shall transmit to the Director the application for indefinite leave, Form WRA-130, and the project investigation record. He shall also comply with the provisions of Section 60.6 of this Handbook with reference to any accompanying application for leave clearance. * * *

Director's Investigation and Ruling

60.6. Upon receipt of such file from the Project Director, the Director will take such further steps as may be required to review the action of the Project Director or to make his own ruling. If the Project Director has not granted indefinite leave, the Director will investigate the applicant's prospective employment or other means of support and the conditions and factors affecting the applicant's proposed residence. If the applicant has not previously obtained leave clearance, the Director will conduct the further investigation described in Section 60.5.6 of this Handbook. Where a considerable time has elapsed since the applicant secured a leave clearance, the Director will take such measures as he deems appropriate to bring down-to-date the investigation pertinent thereto. Upon completing the investigation appropriate in any case where leave has not been granted by the Project Director, the Director will instruct the Project Director to issue or to deny indefinite leave, or to issue such leave on special conditions. * * *

60.6.1. Every evacuee who has reached or who hereafter reaches his seventeenth birthday shall file an application for leave clearance. Application for leave clearance must accompany or precede an application for short term, seasonal work, or indefinite leave. * * *

2. The Project Director shall make such investigation as may be practical to verify and supplement at the project the information supplied by the applicant. This shall include a check with the Internal Security Officer of the project and may include interviews with any reference the applicant gives and interviews with persons with or for whom the applicant has worked; so far as any such references or other people are on or accessible from the project for personal interviews. He shall embody in a project investigation record any material information not certified by the applicant's signature. He shall send out to all other references given by the applicant a franked envelope addressed to the Director in Washington and a form letter, WRA-140, which requests a reply to be sent to the Director in Washington. * * *

3. The Project Director shall then recommend the disposition to be made of the application for leave clearance—which may be either allowed, disallowed, or allowed with special conditions. Unless he deems the applicant entitled to clearance without doubt, he shall state reasons for the recommendation made. * * *

4. When the case suggests a need for further investigation concerning particular matters such as addresses, ship manifests, or organizations, which cannot be investigated on the project, the

project investigation record shall call particular attention to these matters and shall list them together with any available leads for further investigation.

5. When the Project Director is satisfied that the file on the application contains all the relevant information more accessible from the project than from Washington, he shall transmit to the Director five copies of the Individual Record, Form WRA-26, three copies of the application for leave clearance, Form WRA-126, Revised, and one copy of the project investigation record and his findings and recommendations. * * *

6. * * *. Upon receipt of such forms or upon receipt of the papers transmitted from the projects pursuant to this Section 60.6.5, the Director will obtain from the Department of Justice such information as may be obtainable, will examine any letters received from applicant's references, and will take such steps as may be necessary to satisfy himself concerning the probable effect upon the war program and upon the public peace and security of issuing indefinite leave to applicant. He will thereupon instruct the Project Director whether applicant is eligible for indefinite leave for the purpose of employment or residence anywhere in the United States except prohibited military areas, whether any subsequent application for indefinite leave involving residence or employment in the Eastern Defense Command must be submitted to the Director, whether the Provost Marshal General's Department has determined that the applicant is eligible for employment in

plants and facilities vital to the war program, and whether any special conditions are to attach to any leave issued pursuant to such clearance. Forms WRA-258, 258a, and 258b will be used for this purpose. * * *

7. The Project Director will enter these instructions in the applicant's leave file and make suitable entry upon the register of those eligible for indefinite leave. He shall also notify the applicant on Form WRA-131, Revised, of the disposition of this application for leave clearance. * * *

60.10.1. This section supplements Section 60.6.6 of this Handbook by prescribing procedures to be followed in the case of applications for leave clearance that present difficult problems of clearance because the files do not clearly indicate eligibility for indefinite leave.

2. In each case in which the Director determines that the facts submitted do not clearly indicate the applicant's eligibility for leave clearance, the file or suitable parts thereof, including the application and all information available to the Director about the applicant, will be returned to the center at which the applicant then resides, or last resided, for further investigation. Some files will be completely analyzed before they are returned and the analysis will indicate the factors requiring further investigation. This procedure will usually be followed when the file contains a derogatory intelligence report. Most other files,

however, will be returned under Form WRA-261 without a complete analysis. For example, this action will be taken in cases where the Joint Board does not recommend, or is not expected to recommend, that leave clearance be granted; the files will be returned without complete analysis in order to expedite further consideration by the Project Director. Such files must be examined at the project in order to determine which of the factors listed below are present. All of the factors that occur in a particular file must be adequately covered by the further investigation provided for in Section 60.10.5-C, because each of them throws some doubt on eligibility for leave clearance. Any one of the first nine factors listed below (A through I) is regarded by intelligence agencies as sufficient to warrant a recommendation that leave clearance be denied unless there is an adequate explanation. One function of the investigation is to determine whether an adequate explanation exists. Particular care must be taken to cover these factors thoroughly in the investigation. The remaining factors are of lesser importance but must also be covered by the investigation, since in combination they may present a case in which leave clearance should be denied. The factors are listed as follows:

A. A negative answer to question 28 of the application whether or not subsequently changed either during or after the registration.

B. Failure to answer question 28.

C. A late registration during the special registration in February and March.

D. A request for repatriation or expatriation whether or not subsequently retracted.

E. Military training in Japan. (It is assumed that men have received military training—Gunji Kyoren—if they received any of their education in Japan after the age of 15 and returned to the United States after 1930.)

F. Employment on Japanese naval vessels.

G. Three trips to Japan after the age of six, except in the case of seamen whose trips were confined to ports of call.

H. Ten years residence in Japan by a male citizen of the United States after the age of six, unless he is married to a citizen of the United States and has children.

I. An officer, organizer, agent, member, or contributor to any of the organizations on list "A," which intelligence agencies consider to be organizations known to be subversive. This list will be furnished in a restricted memorandum.

J. An officer, organizer, agent, member, or contributor to any of the organizations on list "B," which intelligence agencies consider potentially or mildly subversive. This list will also be furnished in a restricted memorandum.

K. A qualified answer to question 28 that raises a substantial doubt about loyalty.

L. Attendance at Japanese language school beyond high school age, which is assumed for this purpose to be 14.

M. Trips to Japan (the trips are regarded as most significant if made for a Japanese firm).

N. Residence in Japan.

O. Education in Japan.

P. Marriage to a Japanese alien in the case of American citizens.

Q. Employment by a Japanese governmental agency or a semi-official company.

R. Employment by any of the business enterprises on list "C", which intelligence agencies say have had at least semi-official connections with the Japanese government or have engaged in subversive activities in the United States. This list will be furnished in a restricted memorandum.

S. Employment as a Japanese language school instructor.

T. Shinto religion.

U. Investments in Japan.

V. An answer to question 27 on the application qualified to indicate an unwillingness to fight in the Pacific.

W. Misrepresentations of fact when filling in application.

X. A bad project record.

Y. Derogatory intelligence report about the individual.

Z. Derogatory intelligence report about close relatives.

AA. Close relatives are interned or paroled.

BB. Close relatives are members of organizations listed above in paragraph "I".

CC. Close relatives, particularly males are living in Japan (not much significance is attached to married females living in Japan).

DD. Close relatives have asked for repatriation.

EE. Close relatives have answered question 28 in the negative.

FF. Close relatives who are citizens of the United States have lived in Japan for extended periods of time or have received most of their education in Japan.

GG. Close relatives have investments in Japan.

Policy

60.13.1. It is the policy of the War Relocation Authority to assist evacuees to whom indefinite leave has been granted (except when the leave is primarily for the purpose of attending a college or university) in meeting costs of transportation and initial subsistence expenses where this is necessary in order to enable any evacuee to establish himself and his family in the community to which he is going. Assistance will be given only once and will ordinarily be given only when indefinite leave is first issued. An evacuee who has been granted indefinite leave without receiving assistance, and who then returns to the center and leaves a second time will be given no assistance when he leaves the second time, unless his return to the center was on the recommendation of a Relocation Officer, and the Project Director in the exercise of his discretion concludes that by reason of special circumstances a leave assistance grant is proper.

Amount of Assistance

2. * * * The maximum of assistance will be coach fare for each member of the family, plus \$3.00 per person per day of travel for meals en route, plus five dollars per day for five days (\$25.00) for each member of the family, the latter

sum being designed to meet initial subsistence expenses at the place of destination. This maximum of assistance shall be given in all cases in which the family's resources in cash amount to \$100 per family member, or less. * * *

WRA Form 258a

WAR RELOCATION AUTHORITY

WRA-258a—Formerly at Tule Lake Project Central Utah. Date August 16, 1943

No. 29—List of Evacuees Granted Leave Clearance by the Director of the War Relocation Authority

Name, Endo, Mitsuye; family No., 27908; address, 2916-C; occupation, office clerk-typist; sex, F; age, 22.

(Tule Lake Address).

(Signed) _____

Assistant Director

This leave clearance is based on a consideration of Forms DSS 304A and WRA 126a, or upon Form WRA 126 Rev. A check of question 28 need not be made by the Project Director. Pursuant to a recommendation of the Japanese-American Joint Board, the Project Director may issue to these individuals indefinite leaves for the purpose of employment or residence in the Eastern Defense Command as well as in other areas, provided the provisions of Administrative Instruction No. 22, Revised, are otherwise complied with. The Provost Marshal General's Depart-

ment of the War Department has determined that these individuals are ~~not~~ at this time eligible for employment in plants and facilities vital to the war effort.

WRA Form 131

WRA-131—WAR RELOCATION AUTHORITY

Notice of Action on Application for Leave Clearance

To ENDO, MITSUYE, 29-16-C,
Newell, California.

You are hereby notified that your application for leave clearance dated 2-19-43 has been considered by the Director, and he has instructed me that

- x -- you are eligible to be entered on the list of those cleared for indefinite leave
- * -- the following special conditions are to attach to any leave issued pursuant to such clearance:
- your application for leave clearance has been denied because:

This notice does *not* authorize departure from the relocation center. A suitable application must be made separately at any time you wish to apply for leave.

(Signed) -----

Date 8/23/43.

Project Director

*You are eligible for indefinite leave for the purpose of employment or residence in the Eastern Defense Command as well as in other areas; provided the provisions of Administrative Instruction

No. 22, Rev., are otherwise complied with. The Provost Marshal General's Dept. of the War Department has determined that you, Endo, Mitsuye are not at this time eligible for employment in plants and facilities vital to the war effort.

WAR RELOCATION AUTHORITY

APPLICATION FOR INDEFINITE LEAVE

Note: This application will not be accepted unless an application for leave clearance has been earlier filed on Form WRA-126, or accompanies this application.

Relocation Center _____

Family No. _____

Center address _____

1. Name _____
(Last) (First) (Middle)

2. What is the purpose of the proposed leave? _____

3. If you plan to attend any educational institution, state its name and address:

Name _____

Address _____

Has your leave been taken up with the National Student Relocation Council? _____

(Yes) (No) _____

4. Have you arranged for any employment? _____

(Yes) (No) _____

Name of employer: _____

Address of employer: _____

Occupation of employer: -----

Your prospective occupation: -----

Salary: \$ -----

Attach copy of letter from employer or other evidence of employment.

5. How much money are you starting out with? \$ ----- Have you property providing an income? ----- If so, state nature.

(Yes) (No)

amount and what arrangements have been made for management or conservation of this property:

6. What arrangements have been made to meet your expenses while on leave? If you have not arranged for employment (as specified in 4 above) or for your subsistence at an educational institution, attach proof that you have adequate means of support.

Upon arrival at the first destination of this leave, I undertake within 24 hours to report to the Director of the War Relocation Authority in Washington, D. C., my arrival, and to confirm my business or school and residential addresses. In case of any change of school, employment, or residence, I will give prompt notice of such change.

(Date)

(Signature)

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1944

No. 70

In the Matter of the Application of
MITSUYE ENDO
for a Writ of Habeas Corpus.

MITSUYE ENDO,

Appellant,

MILTON EISENHOWER, Director of War Relocation Authority, etc., et al.,

Appellees.

BRIEF OF THE NORTHERN CALIFORNIA BRANCH OF
THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE
IN SUPPORT OF APPELLANT.

• WAYNE M. COLLINS,

Mills Tower, San Francisco 4, California.

Attorney for Amicus Curiae.

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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1944

No. 70

In the Matter of the Application of
MITSUYE ENDO
for a Writ of Habeas Corpus.

MITSUYE ENDO,

Appellant,

VS.

MILTON EISENHOWER, Director of War Relocation Authority, et al., et al.,

Appellees.

BRIEF OF THE NORTHERN CALIFORNIA BRANCH OF
THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE
IN SUPPORT OF APPELLANT.

JURISDICTION

This is an appeal from a judgment of the District Court of the United States for the Northern District of California made and entered on July 2, 1943 (R.

15-16), denying the appellant's petition (R. 2-10) for a writ of habeas corpus. The District Court had jurisdiction of the cause under 28 U.S.C.A. Sec. 451. The Circuit Court of Appeals for the Ninth Circuit had jurisdiction of the appeal under 28 U.S.C.A. Secs. 225 and 463. The memorandum opinion (R. 15-16) of the District Court is not reported. The case comes before the Supreme Court of the United States upon a Certificate of Questions of Law upon which the Ninth Circuit Court of Appeals desires instructions for a proper disposition of the cause.

BASIC QUESTION INVOLVED

Without first applying to receive the meager and doubtful benefits of a restricted and conditional leave which amounts to nothing more than increasing the dimensions of her prison does habeas corpus lie to release a loyal American citizen from 21½ years of illegal detention by the W.R.A. without trial, where her detention is not based upon an offense but solely upon the fact that her genealogy reveals ancestors who once were of Japanese nationality? This basic question encompasses the four questions certified to this Court for determination.

STATEMENT OF THE CASE

The appellant is a twenty-four-year-old citizen of the United States and of the State of California by birth. She is loyal and devoted to this country and

nation. Her brother also is a citizen and serving in the U. S. Army. Until recently she was detained in the Tule Lake War Relocation Center, a concentration camp, situated at Newell, Modoc County, California. Prior to her incarceration she was a resident of Sacramento, California, and was gainfully employed, occupying the status of a permanent civil service employee of California at Sacramento. In the latter part of 1942 she was removed from said relocation center to another like prison situated at Topaz, Utah, where she is presently confined in custody by the appellees. On February 9, 1943, she applied to the Director of the W.R.A. for a leave clearance. On August 23, 1943, her application was granted. The grant is equivalent to a finding that she is loyal and in no wise a menace to national security, but does not operate as an unconditional release from her detention. While illegally detained by the W.R.A. at the Tule Lake War Relocation Center she applied to the District Court below for a writ of habeas corpus. No return was required or made to her petition, and no hearing was had thereon. The petition was denied and this appeal was initiated from the order denying the petition.

ARGUMENT

A. HISTORY OF OPPRESSION.

Immediately following the attack upon our Hawaiian outposts by fragments of the Japanese naval air-arm on December 7, 1941, the President issued

Proclamation No. 2525 enjoining Japanese nationals within our jurisdiction to preserve the peace and to comply with regulations to be promulgated. On December 8, 1941, he issued Proclamations Nos. 2526 and 2527 placing like injunctions upon German and Italian nationals within our jurisdiction. These proclamations were issued under authority of the *Alien Enemy Act*, 50 USCA 21. (H.R. 2124, 77th Cong., 2nd Sess., May, 1942, pp. 294-300.) Thereafter, between January 20, 1942, and February 7, 1942, the Attorney General, pursuant to power vested in the Executive under the Alien Enemy Act, set up zones upon the Western littoral and restricted the activities of alien enemies therein. (H.R. 2124, pp. 302-314.)

Thereafter, on February 19, 1942, in order to provide for the transportation, food, shelter and other accommodations of persons who might be prohibited from leaving or entering military areas which might thereafter be prescribed by the Secretary of War or military commanders designated by him, the President issued Executive Order No. 9066. (See 7 F.R. 1407.) This order appears to have been intended to ratify and approve the previous restrictive action taken against alien enemies by the Attorney General pursuant to presidential Proclamations 2525, 2526, and 2527. Its preamble declares its purpose was the taking of every possible protection against espionage and sabotage to national defense material, premises

¹Report of "Select Committee Investigating National Defense Migration", commonly called the Tolan Committee Report.

and utilities defined in 50 USCA, Secs. 101 and 104. It is from this order that General DeWitt's proclamations and exclusion orders hereinafter mentioned assert they derive validity. It does not appear that it was intended by the President to permit a wanton discrimination against citizens of Japanese origin. However, it is adroitly worded. If issued under authority of the Alien Enemy Act it had no reference to citizens and the military orders issued under a claim of authority therefrom lack validity. If intended to authorize a discrimination against citizens on the basis of the nationality of their ancestors it is extra-constitutional and the military orders issued under its authority are unconstitutional and void. Military action taken thereunder, whether directed by the President and approved by Congress or not, which abridges practically all the constitutional rights of the appellant and approximately 73,000 citizens is not sanctioned by the Constitution. It is an expression of an arbitrary and autocratic rule undignified by the name of government. Autocracy admits the people are under the heel of tyrants whereas representative government implies that the governing bodies represent the people within constitutional boundaries.

On March 2, 1942, John L. DeWitt, Lt. Gen., U.S. A., promulgated Public Proclamation No. 1 (7 F.R. 2420) which set up Military Areas Nos. 1 and 2 and required *alien enemies* and *citizens of Japanese ancestry* in Military Area No. 1 to give notice of change of residence. Thereafter, on March 16, 1942, he promulgated Public Proclamation No. 2 (7 F.R. 2405)

which set up four additional military areas, Nos. 3 to 6, inclusive, and required a like giving of notice of change in residence. The military department of General DeWitt's command thusly set up embraces eight Western States and comprises in excess of one-fourth of the total geographical area of the Continental United States.

On March 18, 1942 the President issued Executive Order No. 9102 (7 F.R. 2165), setting up the War Relocation Authority, an executive office, for the purpose of formulating and effectuating a program for the removal, from military areas designated by military commanders, of persons or classes of persons designated but not evacuated therefrom under authority of Executive Order No. 9066.

On March 21, 1942, Public Law No. 503 (18 USCA 97a) became effective.² It makes it a misdemeanor for anyone to enter or leave a military area against a military commander's orders in military areas prescribed by him. As applied the statute appears to be a bill of attainder repugnant to Art. I, Sec. 9, cl. 3

²There is nothing in the legislative history of this statute suggesting that departures of excluded persons from forbidden areas were expected to be other than voluntary. (H.R. 2124, pp. 167-169.) There is nothing therein suggesting that Congress and the Executive were informed or understood that compulsory evacuation and detention on a mass scale were contemplated. There appears to be no evidence that Congress and the Executive, or either, authorized or approved the banishment and imprisonment program later put into practice. Their silence on the matter is not to be construed as acquiescence in the program or approval of it. Their nonintervention does not signify approval and does not constitute a ratification. It means merely that these divisions of government leave it to the judiciary to determine whether a military commander has exceeded the allowable limits of military discretion.

of the Constitution. (See *In re Yung Sing Hee*, 36 Fed. 437.)

Thereafter, on March 24, 1942, he promulgated Public Proclamation No. 3 (7 F.R. 2453) which subjected the appellant, all alien enemies and persons of Japanese ancestry within Military Area No. 1 and zones in Military Areas Nos. 2 to 6, inclusive, to *curfew regulations* and *travel restrictions*. It threatened the citizens affected thereby with criminal prosecution under Public Law No. 503 for a violation of its provisions and alien enemies with internment for a violation thereof. It also prohibited citizens of Japanese ancestry from possessing certain personal property and compelled the confiscation thereof. On the same day he issued Civilian Exclusion Order No. 1 (7 F.R. 2581) excluding Japanese aliens and citizens of Japanese ancestry from Bainbridge Island, Wash., allowing those who received permission to leave by March 29, 1942, for destinations outside the boundaries of Military Area No. 1 and enjoining those remaining there, on March 30, 1942, to report to a Civil Control Station for evacuation.

On March 27, 1942, he promulgated Public Proclamation No. 4 (7 F.R. 2601) which prohibited the citizen appellant and all other persons of like ancestry from leaving the limits of Military Area No. 1 where she resided and was employed. This put an end to voluntary departure for destinations outside his jurisdiction. (See also, Public Proclamation No. 6: 7 F.R. 4436.) It also threatened citizens with criminal prosecution and alien enemies with internment for

a violation of its provisions. On March 30, 1942, he issued Public Proclamation No. 5 (7 F.R. 3725) allowing certain German and Italian aliens exemption from exclusion from military areas. Like exemptions were not allowed to alien Japanese and citizens of Japanese stock.

Thereafter, he issued a series of civilian exclusion orders which resulted in the imprisonment of some 73,000 citizens and 43,000 aliens of Japanese descent. A total of 108 of these orders was issued by the proud General, No. 1 having issued on March 24, 1942 (7 F.R. 2581), and the last, No. 108, having issued on July 22, 1942 (7 F.R. 5916), each being published in Volume 7 of the Federal Register. These orders ought to be termed "*Dispersion Orders*" because, by reason of them, thousands of men, women and children were driven from homes into government controlled ghettos or prisons. In this shameful fashion these unfortunate citizens, old and young, were discriminated against because of the old cast-off nationality of their ancestors, were branded disloyal and were robbed of their properties, rights and liberties.³ They have been classed and treated as though they were criminals of the lowest type for whom the treatment reserved for hostile alien enemies and prisoners of war was deemed too good.

Under these various civilian exclusion orders the imprisonment of these people was accomplished as

³It is probable that on December 7, 1941, each family of Japanese stock within our jurisdiction had at least one representative serving in our armed forces. In addition to those then serving in the Territorial Guard and the National Guard of Hawaii, in excess of 5000 youths of Japanese ancestry were serving in the Army.

follows: They were ordered from the whole of California (See Public Proclamations Nos. 4 and 11; 7 F.R. 2601 and 6703) and portions of Washington, Oregon and Arizona unless they were within the bounds of Assembly Centers which were under the control of the W.C.C.A.,⁴ a military agency set up by General DeWitt and termed the Wartime Civil Control Administration. (See also, Public Proclamation No. 7 of June 8, 1942; 7 F.R. 4498.) These orders drove them into these Assembly Centers, from which they were removed under military guard to Relocation Centers managed by the W.R.A. On May 19, 1942, the General issued Civilian Restrictive Order No. 1 (8 F.R. 982), a general detention order prohibiting these people from leaving these Assembly and Relocation Centers without authority.⁵ On June 27, 1942, he promulgated Public Proclamation No. 8 (7 F.R. 8346) which designated existing and future relocation centers within his department as War Relocation Project Areas. It required the inmates to

⁴This is one of the few alphabetical agencies that does not appear to have been created by executive order but, like Athena, seems to have sprung full-grown and full-armed from the brain of General DeWitt who would play the role of Zeus over these people.

⁵Neither Civilian Restrictive Order No. 1 (8 F.R. 982) nor Public Proclamation No. 8 (7 F.R. 8346), was directly or indirectly authorized or approved by Congress and the executive or by either. The power to issue these detention orders never was delegated to General DeWitt and could not be delegated to him under the Constitution. They were products of usurped power of an extra-constitutional nature. When Public Law No. 503 became effective it was not understood by Congress or the President that it was intended to be used as an instrument to cause the mass banishment and imprisonment of a people. Consequently, it cannot be argued that Congress and the President or either of them authorized or approved the program inaugurated by General DeWitt.

remain within the bounds thereof and visitors to obtain written permission from his headquarters to visit them. With all these requirements and the trappings and atmosphere of these camps the appellees and the General would lead us to believe these camps are sanctuaries or asylums maintained by the government instead of prisons or concentration camps. By letter dated August 11, 1942, the General delegated authority to the W.R.A. to issue permits for conditional leave from these prisons to persons who could qualify therefor. The source of his right to delegate this authority is not apparent. On August 13, 1942, the Secretary of War issued Public Proclamation WD-1 (7 F.R. 6593) under which the relocation centers *outside* General DeWitt's departmental command were designated military areas and the departure of persons of Japanese origin there confined was forbidden without permission of the Secretary of War or the Director of the W.R.A. The triumvirate, the General, the War Department and the W.R.A., were responsible for the wrongs of which we complain.

Civilian Exclusion Order No. 52 (7 F.R. 3559) with which we here are concerned issued on May 7, 1942. Under this extraordinary order the appellant was required, under pain of criminal prosecution under Public Law No. 503, to abandon her home and was compelled to report to a Civil Control Station.⁶ There

⁶In practice the citizen who violated an exclusion order was made subject to greater punishment than the alien enemy violator. The alien ran the risk of internment. The citizen ran the risk of prosecution under Public Law No. 503, fine and imprisonment in a federal penitentiary upon conviction and, thereafter, confinement in one of these concentration camps. —

she received military commands compelling her to aid her oppressors in accomplishing her temporary imprisonment in a "stockade" termed an Assembly Center, her banishment from these States-embracing military areas, and her ultimate confinement and detention in a military prison for an indefinite period of time. In official documents this prison bears the deceptive cognomen of a War Relocation Center. The misleading names applied to these centers were designed to conceal from the public-at-large, but not from the prisoners, the patent fact of the existence of concentration camps for citizens in civilized America. By reason of this mistreatment she was deprived of her liberty, her home, her property, her employment as a permanent civil service employee of California and the emoluments of said office. Under said order she was coerced into an Assembly Center situated in Sacramento, from whence she was removed under armed military guard to the aforesaid prison at Tule Lake. (See Civilian Exclusion Order No. 100 issued by said General on June 30, 1942, 7 F.R. 5369; and Public Proclamation No. 11 of August 18, 1942, 7 F.R. 6703.) Thereafter, under reshuffling orders of the W.R.A., she was removed to the Relocation Center situated at Topaz, Utah, where she is now detained by the appellees. This is another of the ten relocation centers, six of which are within the military department of the Western Defense Command

This removal does not deprive the Court of jurisdiction in habeas corpus proceedings. See *Ex parte Catanzaro*, 138 Fed. (2d) 100; 28 U.S.C.A. Sec. 463; Rule 29 (1) of the Rules of the Ninth Circuit Court of Appeals; Rule 45, par. 1, of Rules of the Supreme Court.

and four of which are situated outside said department. (See Public Proclamation WD-1, dated August 13, 1942, 7 F.R. 6593, establishing these prisons.)

We charge, therefore, that General DeWitt, the military commander who once commanded the Western Defense Command and Fourth Army, arrested, banished and imprisoned the appellant without color of right and in utter defiance of the very Constitution he was by oath bound to defend and preserve. We charge that this affront was accomplished under an assumption that the writ of habeas corpus was suspendable and impliedly suspended by him in an area free from martial rule. We charge this outrage was accomplished under an assumption that the caprice of a military commander in time of war overrides civil right in an area remote from a theater of war. We charge that her continued detention by the W.R.A. under the pretext that it is authorized by Executive Order 9066 is in disregard of the Constitution and that it intensifies the odious injustice perpetrated upon her by a branch of her own government. We charge that her arrest, banishment and detention were inflicted upon her simply because her genealogy reveals she was unfortunate in having had ancestors over whom a past and almost forgotten Shogun or Mikado asserted a temporal jurisdiction. We charge that the District Court below erred in denying appellant's application for a writ and that therein it upheld this sorry action of the military commander and the illegal detention of the appellant by the appellees.

NATURE OF HABEAS CORPUS.

The writ of *habeas corpus ad subjiciendum* issues for a violation of personal liberty. Although its actual origin is still somewhat clouded in obscurity, it is known to have been in use in England along with the similar writs *de odio et atia* and *de manucaptione* (mainprise) in the 12th century and probably earlier. Being an element of *folk-right* as distinguished from mere privilege it represented a phase of the juridical consciousness of the people. Being tribal in origin, it was a right doubtlessly safeguarded in the 10th and 11th centuries by the shiremoots which were heirs to tribal jural functions and were primarily judicial bodies. The writ could not have originated with the witan of the realm who as administrative officials formulated and applied rules on the grounds of State expediency, that is, State expediency as conceived by them. The people long suffered at the hands of the witan. The political successors of the witan today view themselves as the repository of all political wisdom. They suffer from the delusion their place is at the head and that of men of intellect in the train of great events. They either belittle or ignore the Constitution and appear to regard democracy as a term to beguile the masses while they fashion the harness of dictatorship about them. Viewing themselves as men of importance, of action, of destiny, these so-called history-makers look upon the people as clods of clay they may mold into what forms they will. In Germany after their seizure of political power each of the Nazis who regarded himself as one of the

Witan suddenly became possessed of the notion he was a Wotan. It is a pathological disease to which administrative officials are peculiarly susceptible. It would be a sad commentary on American democracy were our own witan to succumb to a similar contagion.

As a remedial mandatory writ of right *habeas corpus* was a fundamental part of the common law and was implemented by Magna Carta and subsequent enactments. It is based upon the ancient tribal concept that long had been a part of the "law of the land" that a free man could not be detained in custody except on a criminal charge or conviction or for civil debt. This concept later was crystallized and expressed at Runnymede by the Norman baronage and higher clergy in 1215 in Magna Carta in the following words:

"Nullus liber homo capiatur vel imprisonetur aut dissaisetur aut ultagetur, aut exuletur aut aliquo modo destruatur nec super eum ibimus nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terrae."

It was recognized as the proper process against illegal imprisonment by inferior courts and public officials during the early 17th century. In 1627, however, it was held that bodily detention pursuant to the command of the king was a sufficient answer to a writ of habeas corpus. Parliament thereupon passed the Petition of Rights (3 Carl. I. c. 1.) which provided that a freeman could not be imprisoned upon a special command of the king issued without cause. The application of this statute was ignored in Selden's

case (1629).² Consequently, Parliament, in 1640, abolished the Star Chamber and expressly designated Habeas corpus as the appropriate legal measure to test the legality of detention by order of the king or privy council. Thereafter, the Habeas Corpus Act of 1679 (31 Car. II.c.2)³ was enacted. It provided for the enforcement of the common law right to the writ. Its effect was to compel the courts to protect the personal liberties of citizens. It accomplished this purpose by enabling the judiciary to restrain the executive branch of government from usurping legislative and judicial power. Through the instrumentality of the writ inquiries into the cause of detention were made and *lettres de cachet* grew rare. A number of the American colonies adopted this Act prior to the Declaration of Independence and thereafter Congress and the several States founded their procedure thereon. These enactments implement the common law we have inherited from England on the subject. The Act of 1679 was suspended temporarily in times of public danger by special Parliamentary legislation, notably in 1794 and 1817, the exercise of the power of suspension being deemed vested in the legislative and not in the executive division of government.⁴

The writ is so thoroughly entrenched in Anglo-American jurisprudence that it long has been con-

²The history of this struggle in essence is a recapitulation of the fight waged by many peoples in many ages to prevent the executive from exercising legislative powers as the origin of the Declaration of Independence, 1776, the States-General, 1302, Magna Carta in 1215, the Archons in Athens and the Ephori in Sparta confirm.

considered a right absolute of the citizens of a free nation. It was designed to be an effective judicial remedy for the evils of *lettres de cachet* and other types of illegal detention. For centuries it has been esteemed "the best and only sufficient defense of personal freedom." *Ex parte Yeager*, 8 Wall. 85. The right to the writ is derived from the common law but the power of our federal Courts to issue it exists by virtue of the Habeas Corpus Act, 28 USCA, Sec. 451 *et seq.* See *Ex parte Bollman*, 4 Cranch 75. This statute does not define the term habeas corpus, consequently the history, purpose and scope of the writ is determined by an examination of the common law. *McNally v. Hill*, 293 U. S. 131.

Being a traditional incident of judicial power it is doubtful if the writ, in the absence of constitutional authority, could be suspended by Congress any more than the judicial department of government itself could be suspended. There is evidence, however, of a movement and a trend in this country the objectives of which are the relegation of the Constitution to the limbo of antique and curious documents and the withering of the powers of the Courts and Congress. Many politicians and executive officials of the day look with avaricious eyes to the inheritance or capture of absolute political power. They hope the great prize will fall into their laps in this period of public apathy and political bankruptcy when government itself daily grows more amorphous in character and, when, in lieu of congressional statutes, we are confronted with, hemmed in by and ordered about by countless admin-

istrative directives issued in utter disregard of constitutional right. This age in America might well be called the Constitution-Tampering-Age inasmuch as we are treated to the continuing spectacle of experimentation with powers that cannot signify anything but a prelude to dictatorship.

It is noteworthy that the framers of the Constitution assumed the right to the writ to be inherent in judicial power for we find in that document no vesting of the right to issue the writ but we do find expressed therein a wise prohibition against its suspension by Congress, for Art. 1, Sec. 9, cl. 2 provides:

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it."

It is this clear and unmistakable safeguard that has been violated herein as though it were an ambiguous provision to be suspended at the whim of a military commander or in aid of his whim and the suspension to be explained away by judicial sophistry on the spurious ground that it means whatever might serve his interest or prejudice. Although we are in trying times we have not reached the stage where we are willing to concede that the voice of a military commander must be listened to as the voice of God. We recognize that by a multiplication of executive orders the administrative branch of government seems to have encircled Congress and by-passed our Courts but we are not yet so weak and so debased that we are willing to yield all legislative and judicial power to

executive officials. Despite the attacks upon constitutional and human rights by the political epigoni of the day, we are not willing to regard constitutional government as a forgotten episode in American history. We the People do not intend that this, our cherished writ, any more than our Holy Writ, shall be regarded as a trifle and be taken from us by our appointed servants without a struggle. What we have gained and preserved over centuries against government we will not surrender simply to satisfy the whims and vagaries of administrative officials and obscure military commanders.

ISSUES FRAMED BY RECORD.

On its face the application for the writ of habeas corpus filed on July 13, 1942 (R. 19), presented facts setting forth an illegal detention of the petitioner. Consequently, the Court below ought to have issued either the writ or an order to show cause for service upon the respondents." Neither such a writ nor order issued thereon, however. On July 15th and 20th, 1942, oral arguments were heard on the petition and the cause submitted for decision as to whether such a writ or order should issue. The matter was briefed by the parties and by amici curiae.

Thereafter, on January 7, 1943, Elmer Shirrell voluntarily filed an affidavit in the Clerk's Office in the

"The order to show cause or, as it has been termed, rule to show cause, is a procedural innovation which seems to have gained judicial recognition and approval. See *Walker v. Johnston*, 312 U.S. 275 at 284, 287.

proceeding below (R. 12) stating that under an undesignated Proclamation of General DeWitt the petitioner had been removed to the Tule Lake War Relocation Center where she "resides", by which deceitful word is meant she is imprisoned.¹⁰ It recites that she had not applied for a conditional and restricted leave from her prison (R. 13) under the regulations (7 F.R. 7656-7658) promulgated by the Director of the W.R.A. It does not appear from the record whether this anomalous document was served upon the petitioner or her counsel. On February 19, 1943, James C. Purcell, counsel for petitioner, filed in said proceeding a counter-affidavit (R. 14) which would have been entitled to consideration as a traverse thereto under 28 USCA 460 if the affidavit of Mr. Shirrell in fact had been a return under 28 USCA 457. However, neither of the two affidavits satisfies the requirements of a pleading and neither was entitled to consideration as evidentiary matter without a stipulation first being made between the parties to the proceeding or without a hearing on their admissibility.

Thereafter, on July 2, 1943, almost one year later, an order of the Court below denying the petition was entered (R. 15-16) reciting as grounds therefor that it appeared from the face of the petition that the petitioner was not entitled to a writ of habeas corpus and that she had not exhausted her administrative

¹⁰The affidavit was not entitled to consideration and ought to have been disregarded or stricken by the Court on its own motion inasmuch as Mr. Shirrell was not a respondent or counsel for a party but a mere volunteer or interloper in the proceeding below.

remedies under Executive Order 9102 as a condition precedent. By referring to an asserted failure of the petitioner to exhaust her administrative remedies the order indicates the Court below considered the affidavit of Mr. Shirrell and the counter-affidavit of Mr. Purcell either as pleadings or as evidence inasmuch as the matters therein related cannot be deemed to be within the province of judicial notice or knowledge. Therein that Court erred because the petitioner was entitled to a hearing on the admissibility of these affidavits and upon the question whether factual issues were presented, requiring a hearing. However, whether the affidavits were entitled to weight or not is immaterial for, as hereinafter argued, the verified petition considered with or without the affidavits ought to have been granted. Considered alone the petition called for the issuance either of the writ or an order to show cause. Had a return been filed thereto it could not have traversed the petition or raised a conflict upon any material issue tendered thereby, consequently, it would have been the duty of the Court to have discharged the petitioner from custody either with or without a hearing thereon.

When an application for the writ states the required jurisdictional facts, it is the duty of a Court forthwith to "award the writ unless it appears from the petition itself that the party is not entitled thereto." 28 USCA 455. Upon a return being made admitting the facts therein the writ should issue. If the return denies the allegations of the application or raises a substantial conflict on the truth of the recitals contained therein, it becomes the duty of the

Court to hold a hearing thereon to determine the truth of the recitals and thereupon decide whether the applicant is entitled to a discharge from detention. 28 USCA 461. This was expressly decided in *Ex parte Milligan*, 4 Wall. (U. S.) 2, in the following language:

"The suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the Court decides whether the party applying is denied the right of proceeding any further with it."

The application for the writ herein did not reveal on its face any reasons why the writ should not issue. Consequently, it was incumbent upon the Court below to have issued either an order to show cause why the writ should not be granted or a writ as a matter of course for service upon the respondents. *Walker v. Johnston*, 312 U.S. 275, 282. Thereafter the respondents would be entitled to file a return whereupon a hearing on the validity of the detention would follow as a matter of right, 28 USCA 457.

The affidavit of Mr. Shirrell (R. 11) filed informally in the proceeding below long after the cause had been submitted for decision neither traverses the allegations of the petition nor contains a statement of facts justifying the detention of the petitioner. It was, therefore, the duty of the Court below to have ignored it entirely or to have dismissed it as an evasive substitute for a return and thereupon have issued the writ. In wartime a return stating that the detention of an alien enemy is pursuant to a presi-

dential warrant issued under authority of the Alien Enemy Act is sufficient answer to a writ but a similar return cannot be accepted as an adequate answer to the detention of an American citizen. *Ex parte Franklin*, 253 Fed. 984; *Ex parte Risse and Staliforth*, 257 Fed. 102; and *Ex parte Gilroy*, 257 Fed. 110. A person in custody is entitled to have "a judicial inquiry into the very truth and substance of the causes of his detention" through the medium of the writ. This judicial inquiry "involves the reception of testimony, as the language of the statute shows." *Johnson v. Zerbst*, 304 U.S. 458, 466; *Walker v. Johnston*, supra, at 283. The failure of the Court below to issue an order to show cause or the writ and to hold a hearing thereon was erroneous.

There seems to be no logical historical precedent upon which Courts, by resort to judicial knowledge of doubtful data, might invoke a defense to an application for a writ or supply defenses or fill deficiencies in a public official's response to an application for the writ. Such a practice would substitute excuses for reasons. There is neither logical nor legal justification for a Court to adopt the view that the General's constitution-destroying orders are presumptively justified and that a citizen who is abused thereby and whose rights are curtailed are matters of such trifling significance as to merit only casual or perfunctory notice. The failure of the District Court to grant the writ as a matter of course when the petition alleged an illegal detention on its face was a denial of due process of law under the 5th Amendment. Its failure to grant a hearing thereon was a denial of the right

to a speedy and public trial in violation of the 6th Amendment. In addition it violated the provisions of the habeas corpus acts. Title 28 USCA; Sec. 451 *et seq.* The detention of the petitioner in a concentration camp by the military commander and the W.R.A., an executive agency, without trial and without a charge of crime being brought against her, also does violence to the 4th, 5th, 6th and 8th Amendments. *Ex parte Milligan*, *supra*. Her detention and the mistreatment incident thereto under the regulations of the W.R.A. violates the same provisions and also the 13th Amendment.

THE WRIT HAS NOT BEEN SUSPENDED.

In *Zimmerman v. Walker*, 132 Fed. (2d) 442, the Circuit Court of Appeals for the Ninth Circuit sitting in department, Haney, C. J., dissenting, declared the writ of habeas corpus was suspendable in Hawaii where martial law had been proclaimed by the Governor and the writ suspended by him under ostensible authority lodged in him by Sec. 67 of the Organic Act of the Territory, 48 USCA; Sec. 532. A hearing on the application for the writ had been granted by District Judge Delbert E. Metzger to Hans Zimmerman, a civilian citizen, who sought release from detention by the military authorities. (The petition had been filed by Clara Zimmerman on behalf of her husband.) No return was made to the writ. The prisoner was not produced. No evidence was taken at the hearing. Under duress by reason of General Orders

No. 57¹¹ issued by the Commanding General of the Hawaiian Department who had assumed the spurious title of Military Governor of the Territory the Judge denied the application. The petitioner appealed; the Circuit Court sustained the suspension of the writ and upheld the military action detaining Zimmerman by a resort to judicial knowledge of doubtful facts. The petitioner applied to this Court for certiorari to test the validity of martial rule and the suspension of the writ in an area which had been in a combat zone on December 7, 1941, but where the civil authorities on that date and continuously thereafter had been able to function normally except for military interference. While his petition for certiorari was pending the military authorities transported Zimmerman from Oahu to the Pacific Coast where, without explanation, they released him from custody. Their purpose in releasing him was obvious. Fearing a decision by this Court on the merits of the cause adverse to their desires they released him to render moot the questions presented by his appeal. The detention having been terminated abruptly the Solicitor General hastily filed a memorandum with this Court arguing the cause had become moot by reason of the release and this Court denied the petition. See memorandum opinion, 87 L.Ed. 928, denying certiorari. Zimmerman felt the oppressive hand of arbitrary government and was tricked out of his judicial remedy.

¹¹This order forbade the issuance of writs of habeas corpus. See text of order in 36 Calif. Law Review 396. It was not published in the Federal Register but in the Honolulu newspapers by order of the Military Governor. As were other military orders, without cost to the government.

Much publicity has been given to recent cases arising in Honolulu involving naturalized citizens of German extraction engaged in civil walks of life who had been taken into custody by the military authorities. See *Ex parte Glockner*, U.S.D.C. Hawaii, No. 295, and *Ex parte Seifert*, No. 296. On August 16, 1943, courageous Judge Metzger concluded that the Governor's Proclamation of February 8, 1943,¹² restored civil authority to the Territory and issued writs of habeas corpus commanding Lt. General Robert C. Richardson to produce the two applicants. The General ignored the commands and countered with a military fiat (General Orders No. 31) prohibiting all the Courts in the Territory from issuing writs of habeas corpus and the Judge from proceeding in the two cases in question. A violation of this fiat carried a penalty of \$5000 fine and 5 years imprisonment if convicted in a provost court and any penalty, including the death penalty, if convicted by a military commission. The Judge fined the General \$5000 for contempt of Court. The Attorney General's office injected itself into the controversy, prevailed upon the General to rescind General Orders No. 31 and to release the two citizens from custody and succeeded in persuading the Judge to reduce the fine to \$100.¹³ Thereafter, the President pardoned the General. This was

¹²See text of proclamation in 31 Calif. Law Review 508 in appendix to article by Garner Anthony on "Martial Law in Hawaii".

¹³Glockner and Seifert were removed to the mainland United States and released from illegal detention by the military authorities. This prevented a final determination of the important issues by our Appellate Courts. The military authorities and, apparently, the Attorney General, appear to have been determined to delay a final judicial determination of citizens' rights.

a tacit recognition by the President that the General had blundered.

On March 14, 1944, Lloyd C. Duncan, a civilian detained by the military authorities under a sentence of a provost court set up at Pearl Harbor, applied for a writ of habeas corpus. The writ issued, a return was made and a hearing was had on the merits. The respondents urged the detention was justified by virtue of a state of martial rule prevailing over the Territory. The argument, that a continuous state of martial law had been lawfully invoked and the writ lawfully suspended by a declaration of the territorial governor pursuant to authority delegated to him by statute made little impression. The writ was granted; the respondent appealed. See *Kahanamoku v. Duncan*, No. 10,763, and *Steer v. White*, No. 10,774, a companion case, pending in the Ninth Circuit Court of Appeals. The Judge's decision sustains our faith in government by law and restores our confidence in our Courts and in the great principles for which this Republic stands. In Hawaii, at least, the Constitution is regarded as the supreme law of the land by the civilians and the civil authorities if not by the military authorities.

Congress alone has the power to proclaim and institute martial law and to suspend the writ. *Ex parte Milligan*, supra; *Despan v. Olney*, 7 Fed.Cas. No. 3822.—In the absence of a declaration of martial law the arrest and detention of a citizen by military authorities is unlawful. *U. S. ex rel. Palmer v. Adams*, 26 Fed. (2d) 141. Congress has not authorized the suspension of the writ of habeas corpus on the Pa

cific Coast. It has not delegated or attempted to delegate the power of suspension to any executive officer. Martial law has not been proclaimed by Congress and martial rule has not been applied in this area by the Executive either with or without the approval of Congress. This area has not been in a *theater of war* as defined in the *Milligan* case. It has not been occupied by our own troops under a belief that our shores were invaded or that a rebellion had broken out in this region or that either invasion or rebellion was imminent or impending. It is not under the heel of an invader. Our civil authorities have continued to function normally. There has been no civil disorder in the country. There has not been a breakdown in the enforcement machinery of municipal law. Our Courts steadily have been open and engaged in the full performance of their normal duties. A military government has not been provided for the population of the Pacific States. It may be established in conquered or invaded territory. *Hamilton v. Dillin*, 21 Wall. (U.S.) 78, 22 L.Ed. 528; 67 *Corpus Juris*, 421, Sec. 17113 and 422, Sec. 475(2). It cannot be established in domestic territory unless it is in a state of rebellion or civil war. *Heffernan v. Porter*, 6 Coldw. (Tenn.) 391, 98 Am. Dec. 459; *Ex parte Milligan*, supra; 67 *Corpus Juris*, 422, Sec. 176(3). Without interruption from the December 7, 1941, attack upon Pearl Harbor to date the civil authorities in the Western States have been and now are functioning normally. Consequently, the decisions in the Hawaiian cases which involved questions of martial law have no application to the issues involved herein.

THE IMPRISONMENT PROGRAM WAS INSPIRED BY
DeWITT'S PREJUDICE.

The secrecy of his reasons indicates his prejudice.

The detention of which the appellant complains does not arise under a claim of martial law or military government. The theory that has been suggested for the mischief done her is that it was an expression of war-power. It is odd, however, to learn that this expression of the war-making, war-waging or federal police power was directed against citizens and based upon the ambiguous excuse of a military necessity. The grounds for the existence of this nebulous necessity strangely enough long were left to the field of surmise by the military commander responsible for this military misrule. It is significant that this false necessity vanished and all talk of it ceased when General DeWitt was relieved of the Western Defense Command.

In *Hirabayashi v. U. S.*, 320 U.S. 81, this Court resorted to speculation to supply possible reasons to sustain the validity of a curfew regulation imposed upon citizens of Japanese stock by General DeWitt. It was impelled to do this because the General failed to reveal the motives that inspired his action. With seeming reluctance it invoked judicial knowledge of facts necessary to support a basis for the claim of military necessity justifying a curfew applied on a discriminatory basis. The facts were rendered palatable to the judicial tongue only by casting them into that age-worn mold from which they emerge branded matters of common knowledge or of public notoriety. Each of the facts assumed as true was highly dubious.

and disputable. Had the military commander publicly expressed his reasons for his action prior to the decision it is not improbable that the curfew regulation as applied to citizens would have been declared unconstitutional and void. However, the reasons for his action were not matters of judicial knowledge because if he had any aside from prejudice they were kept closeted in the recesses of his mind until long after the *Hirabayashi* opinion was rendered. His mind could not be probed through the medium of judicial knowledge to gain information as to its secrets.

His final report demonstrates his prejudice.

On January 19, 1944, General DeWitt's "*Final Report, Japanese Evacuation from the West Coast*" was publicly released. This astonishingly brazen document is nothing but a private and self-serving report by a subordinate general to his superior officer offered as an anticipatory defense to implied charges of wrongful action. It is not an official government report. It has not been ratified, approved or adopted as an official governmental report either by the War Department or by the Commander-in-Chief. It does not appear to have been presented to the Department of Justice for approval before publication. It cannot be said that the Department of Justice ever concurred in the barbarous evacuation and imprisonment program. It appears that it opposed the program prior to its institution. It cannot be said that the President approved the plan. Executive Order No. 9066 contains nothing on its face that would have led him to

believe it would be used by a military commander to discriminate against citizens on a race origin basis. The fact that he did not interfere with the evacuation and detention is understandable. It has been characteristic of him not to interfere with the actions of military commanders but to permit them a free hand. His non-intervention is not to be construed as indicating his approval. It is not his duty to determine whether the military commanders have overstepped the allowable limits of military discretion where civilian rights have been infringed. This is a matter for our Courts to determine. *Sterling v. Constantin*, 287 U.S. 378.

From the title of the report one gathers the impression that it relates to aliens only inasmuch as it contains the appellation "Japanese" and that it covers an evacuation from the West Coast only. Inasmuch as the evacuation uprooted and excluded citizens from approximately one-fourth of the geographical area of the continental United States, the General's view of what the West Coast comprises appears to be not a little distorted.

On page 7 thereof he reveals his vicious program was carried into execution simply because he suspected the geographical distribution of persons of Japanese pedigree on the Pacific Coast "appeared to manifest something more than coincidence." He concluded that these people were "ideally situated with reference to points of strategic importance, to carry into execution a tremendous program of sabotage on a mass scale should any considerable number of

them have been inclined to do so." It is significant that this report was compiled and published long after the evacuation program had been an accomplished fact. From the absurd reasons revealed therein it is quite evident that he hunted, sifted and worried in an effort to find grounds to justify his action and that he finally was impelled to resort to hypothesis supported by imponderable facts to support it. What he now offers therein as props for his astounding action is demonstrated to be nothing but a vague suspicion he entertained of these citizens by reason of their ancestry and geographical distribution coupled with an apparent prejudice he harbored against them. Whether he was misled by propaganda into believing these people were dangerous or whether he viewed them as a menace simply by virtue of his inherent prejudice against them makes little difference. Neither reason created an actual military necessity or condition justifying their banishment or any type of discrimination against them. Not one authentic case of espionage or sabotage can be attributed to any of these citizens or aliens, either prior to or since Pearl Harbor. It must be assumed that he was familiar with the fact that none of these people in Hawaii had been guilty of any disloyal or hostile acts. The Tolan Committee hearings had been attended by his observers in San Francisco and Los Angeles and its published report revealed that all the reliable data from Hawaii proved they were as trustworthy as any of our inhabitants. (H.R. 2124, pp. 49 to 59.) He knew or ought to have known from his own observa-

tion and reputable authorities on the Pacific Coast that the citizens of Japanese ancestry here were as loyal and devoted to this country as any citizens and that the aliens were as friendly to us as "white" aliens if not more so. Ignorance on his part of these facts is inexcusable.

His public utterances prove his prejudice.

That it was prejudice and not a *bona fide* military necessity that inspired his extreme orders which resulted in the detention of the appellant and 73,000 citizens appears from testimony he gave before a House Naval Affairs Sub-committee in San Francisco which was circulated widely by press and radio. The San Francisco News of April 13, 1943, quotes a part of his testimony as follows:

"Charges of a movement to bring American-born Japanese back to the Pacific Coast were made today by Lieut. Gen. DeWitt, commanding general of the Western Defense Command and Fourth Army, at a House naval affairs subcommittee hearing here. He said he would oppose this movement with every effort and means at my disposal."

"I don't want any Jap back on the Coast," said General DeWitt, after informing the committee of "a feeling developing in certain sections and among certain elements" to bring these American-Japanese back to the Coast military area.

"There is no way to determine their loyalty," he declared. "This West Coast is too vulnerable. I am opposing this movement with every effort and means at my disposal."

I have two problems—defending this Coast against espionage and sabotage by the Japs and driving them off the face of the map in the Aleutians.

It makes no difference whether the Japanese is theoretically a citizen—he is still a Japanese. Giving him a piece of paper won't change him.

I don't care what they do with the Japs as long as they don't send them back here. A Jap is a Jap.' ”

His charge that these American citizens are *Japs* is false. A Jap, a contraction of the word Japanese, is a person of Japanese nationality. These citizens are of American nationality and no General, as an administrative official, has the right to brand them nationals of an enemy nation. The three stars on the shoulder straps of a lieutenant-general which these citizens through the Congress have conferred upon him do not entitle him in his official capacity to brand loyal citizens traitors to this nation. They do not establish in the wearer an infallibility in judgment as to what is and what is not a military necessity. They do not guarantee the wearer to be free from prejudice. They do not remove his acts and utterances from the field of public opinion, criticism and censure. They do not operate as a guaranty that the wearer is always a person of sound judgment and mature discretion.

His testimony betrays a wanton willingness to ignore the constitutional rights and liberties of these citizens. It also exhibits a peculiar and remarkable

knowledge as to the methods by which citizenship is obtained. Alien Japanese are ineligible to citizenship. *U. S. v. Ozawa*, 260 U.S. 178. The native-born become citizens by virtue of the fact of their birth in this country under the *jus soli* as expressed in the 14th Amendment. *U. S. v. Wong Kim Ark*, 169 U.S. 649; *Morrison v. California*, 291 U.S. 82; and *Regan v. King*, 134 Fed. (2) 413, cert. den. 87 L.Ed. 996. Neither the alien ineligible to citizenship nor the native-born receives a certificate of citizenship, the "piece of paper" so disparagingly referred to by the General. His remark that a "Jap is a Jap" as applied by him to American citizens of Japanese ancestry reveals that he regards the provisions of the 14th Amendment very lightly. The Amendment confers American nationality and citizenship upon the native-born regardless of the nationality of their forebears. Citizenship is not limited to the pink-complexioned and is not a thing of degree. If an American-born citizen of Japanese ancestry is a Jap and not an American, as the General asserts, the General himself cannot be an American either but necessarily must be of the foreign nationality that attached to his own ancestors.

In view of his testimony and the contents of his "Final Report" it no longer can be argued that the evacuation and imprisonment program he instigated was based upon a military necessity or that it was the result of sound discretion and mature judgment. Neither can it be said that his action taken against the appellant was conceived in good faith and was an

emergency war measure directly related to the prevention of a crime in which the appellant was a participant. Neither his orders nor those of the appellees herein satisfy the tests necessary to validate military or administrative action abridging a citizen's fundamental constitutional rights which were laid down in *Sterling v. Constantin*, supra. It follows that the detention of the appellant by the appellees is illegal and that it was error for the District Court to have refused to issue the writ unless there is merit in its conclusion that the petitioner failed to exhaust her administrative remedies as a prerequisite to the right to receive the writ.

CONSTITUTIONAL RIGHTS INVADED.

In issuing his proclamations and orders arresting and banishing the appellant and these evacuees the General usurped legislative power in violation of Art. I of the Constitution. In presuming to sit in judgment on these people after seizing them and condemning them to exile and detention without accusations of crime being brought against them and without affording them trials the General and the W.R.A. have usurped judicial power in violation of Art. III of the Constitution and have violated the provisions of the 4th and 6th Amendments. *Ex parte Milligan*, supra. They persist in depriving them of the fundamental "privileges and immunities" of citizens guaranteed by Art. IV, Sec. 2, cl. 1 of the Constitution and of all the inalienable rights of national and state

citizenship in violation of the due process clause of the 5th Amendment. See *Schneider v. Irvington*, 308 U.S. 147; *Holden v. Hardy*, 169 U.S. 366, 389; *U. S. v. Cruikshank*, 92 U.S. 542; *Corfield v. Coryell*, 4 Wash. (U.S.) 371, 6 Fed.Cas. No. 3230; *Hague v. C. I. O.*, 307 U.S. 496. They have restricted the "freedom of movement" to which these citizens are entitled. *Williams v. Fears*, 179 U.S. 270; and concurring opinions in *Edwards v. California*, 314 U.S. 160. They have curtailed the right of these people "to live and work" and "to establish a home" where they will. *Allgeyer v. Louisiana*, 165 U.S. 578, 589; *Meyer v. Nebraska*, 262 U.S. 390, 399; *Colgate v. Harvey*, 269 U.S. 404. The appellant has been deprived of her right to work, of the earnings of her labor and her status as a permanent civil service employee of the State of California in violation of the due process clause of the 5th Amendment and of the just compensation clause thereof. These are property rights. *Truax v. Raich*, 239 U.S. 33, 38. Evidently the General and the W.R.A. are unaware that these privileges of national citizenship inhere in all citizens and are safeguarded by the Constitution. Apparently they view these unfortunates as *res* and *persona* but not as citizens or humans. It seems clear they do not view banishment and detention as constituting an *infamous punishment* forbidden by the 5th Amendment (*U. S. v. Moreland*, 258 U.S. 433) or as constituting a *cruel and unusual punishment* forbidden by the 5th and 8th Amendments. (See opinions of Justice Brewer in *U. S. v. Ju Toy*, 198 U.S. 253, 269-270.) Apparently they do

not view the detention as a form of slavery forbidden by the 13th Amendment. Evidently they did not realize that what they were doing was forbidden as working a corruption of blood and forfeiture upon these people, without trial, upon a theory of the constructive treason of their remote ancestors. This is forbidden by Art. III, Sec. 3 of the Constitution. *Shortridge v. Macon*, 22 Fed.Cas. No. 12,812. They could read the Constitution with profit if not for pleasure. Had they been conscious of its principles they would not have meddled with the rights of these citizens. Ignorance of the law cannot be accepted as an excuse for their wrongful action. Their attitude was reckless which makes the wrongs worse.

Individual guilt appears to be the test for a deprivation of substantial constitutional rights. *Ex parte Quirin*, 317 U.S. 1. The appellant has not been accused of crime. The Director of the W.R.A. has found her to be loyal. If a military tribunal could not try Milligan it is difficult to understand how a military commander and the Director of the W.R.A. could seize the appellant without charges being lodged against her, dispense with a trial or try her in the recesses of their own minds or upon secret evidence and condemn her to imprisonment. Such mistreatment is not only violative of the 4th, 5th, 6th, 8th and 13th Amendments but is an assumption by each of them of judicial power lodged exclusively in the Courts by Art. III of the Constitution. It is also a usurpation by them of legislative power lodged exclusively in Congress by Art. I of the Constitution.

It is also directly violative of the natural rights and liberties reserved to the appellant by the 9th and 10th Amendments.

The validity of the detention of the appellant is to be determined by conditions existing at the time her application for a writ of habeas corpus finally is decided by this Court. *Stallings v. Splain*, 253 U.S. 339, 343; *Mensevich v. Ted*, 264 U.S. 134, 136. The Court will take judicial notice of the utter absence of any military necessity justifying her detention. The Battle of the Coral Sea in May, 1942; and the Battle of Midway (June 2-6, 1942) removed Hawaii from any threat of invasion. The remote Aleutians have been cleared of enemy troops. Our flag flies over the Solomon, the Gilbert, and the Marshall Islands. Our forces occupy the Marianas. Japan is on the defensive in her own homeland and surrounding waters. She has lost the initiative, the capacity and the taste for offensive warfare. She is incapable of constituting a serious threat of danger to our island outposts or to the islands wrested from her grasp. It is extremely doubtful that she could launch an isolated air-attack against the mainland United States. Germany is hemmed in a ring of steel—her military might in Europe is ebbing rapidly away—she is near final defeat. In granting the appellant a leave clearance the Director of the W.R.A. admits she is a loyal citizen, and admits that she is not a menace to our security. Nevertheless, he persists in detaining her against her will and desire in a degraded concentration camp. The writ should issue.

NEITHER EVACUATION NOR DETENTION WAS AUTHORIZED
BY THE PRESIDENT AND CONGRESS OR BY EITHER.

Executive Order No. 9066.

In the *Hirabayashi* case this Court held that Public Law No. 503 constituted a ratification of Executive Order No. 9066 in so far as the order might be construed to authorize the imposition of a curfew regulation for a limited period of time as an emergency war measure designed as protection against possible espionage and sabotage at the time of a threatened invasion. The decision contains no intimation that the presidential order was intended to authorize the General to evacuate and imprison citizens or that it did or could authorize such action. Public Law No. 503 became effective on March 21, 1942, that is, 3 days before evacuation was ordered by General DeWitt and 4 days before the evacuation actually commenced on March 30, 1942, under Civilian Exclusion Order No. 1. There is nothing in the statute delegating authority to the executive or any military commander to banish and detain citizens. There is nothing in its legislative history indicating an intention on the part of Congress to delegate such a power. The statute does not delegate to the executive or to any military commander an authority to banish and detain citizens. Congress is forbidden to delegate its legislative power. It may delegate a *limited discretionary power* to executive officials only where it first sets up a standard, rule or policy for the guidance of the executive officers and trusts in them the making of subordinate rules in aid of the enforcement of the statute and leaves to them the determination of the facts to which the policy

declared by Congress is to apply. *Schechter Poultry Corp. v. U. S.*, 295 U.S. 495. The statute does not delegate such a limited authority and sets up no standards, guides or policies for an executive or military officer to follow. The authority to banish and detain citizens without accusation of crime brought against them and without hearings observing the elements of due process of law would not seem to be within the war-power of Congress and the Executive for it would be tantamount to a suspension of the Constitution. Congress has not even attempted to ratify the banishment and imprisonment of these citizens. Neither the President nor Congress has signified approval of this program. The emergency justifying a discriminatory curfew certainly ceased no later than the time when our great victory in the Battle of Midway (June 2-6, 1942) secured Hawaii from the possibility of invasion and our shores from attack. It is not conceivable that any claim of emergency could justify the mass banishment and imprisonment of citizens simply because their ancestors once may have been subjects of a country with which we are today at war. Even though the Battle of Midway put an end to the advance of the Japanese forces and secured our shores from danger General DeWitt continued on with his evacuation program until the latter part of August, 1942, when the last of the evacuees was herded into a concentration camp.

It is a matter of common knowledge that our Pacific shores have not been invaded by the enemy. It is also a matter of common knowledge that there has not been

any real or imminent danger of espionage or sabotage to our military resources arising from the appellant or any of these detained citizens. No such charge of crime has been lodged against the appellant or any of these evacuated persons. Individual civilian exclusion orders issued by a military commander have been held to want validity on the ground that at the time of their issuance there was not present a reasonable and substantial basis for the judgment of the military commander issuing them that a threat of espionage or sabotage to our military resources was real and imminent. *Schueller v. Drum*, 51 Fed. Supp. 383; *Ebel v. Drum*, 52 Fed. Supp. 189. Executive Order No. 9066 does not appear on its face to have been intended to authorize a military commander to prescribe military areas of States-embracing extent or to grant him an unlimited control over civilians residing therein. The President has never asserted that such powers were lodged in himself or in any military commander. Doubtlessly he understood his order was to authorize the setting up of protective areas around military and defense installations, a limited objective of far different character from the extensive prohibited military areas General DeWitt set up in his Military Department. It is to be assumed he understood his order was to be used to exclude alien enemies from such restricted areas and, perhaps, citizens found to be dangerous to our security after first being submitted to examinations observing the elements of due process of law. His authority to exclude and detain alien enemies can be asserted by executive order or by presidential warrants pursuant to the Alien Enemy Act.

Executive Order No. 9102

On March 18, 1942, the President issued Executive Order No. 9102 (7 F.R. 2165) establishing the War Relocation Authority, an executive office. It delegated to this office the duty of formulating and effectuating a program for the removal, from military areas prescribed by military commanders under Executive Order 9066, of persons or classes of persons designated but not evacuated thereunder. It also vested in the Director of the W.R.A. authority to provide for the relocation, maintenance and supervision of all persons deported from the military areas. As applied the order aptly may be described as a "Ghetto-Establishing-Order". It also created the W.R.A. Work Corps and authorized the Director to "prescribe the terms and conditions of the work to be performed" by the evacuee citizens and aliens in the Corps and "the compensation to be paid". It is under this singular directive that evacuated citizens were recruited to perform menial tasks and hard labor at peon wages. The analogy between this type of labor and that of the vaunted Nazi Labor Corps is shocking to our sensibilities. What is this if it is not slavery and involuntary servitude? It would appear that our executive branch is unaware of the purposes of the 13th Amendment. Interned citizens and aliens employed in these camps are eligible to receive either \$12, \$16 or \$19 per month. (See W.R.A. Manual, Chap. 50.5, par. 6-H et seq.) They labor 8 hours per day for this pittance.

The context of the order contains a recital that it was issued by virtue of authority vested in the Presi-

dent "by the Constitution and statutes of the United States". Consequently, it invokes the Alien Enemy Act and was clearly intended to apply to alien enemy evacuees. If, by the recital of constitutional authority, the President intended it also to apply to citizens it must be deemed he intended it to apply only to those individual citizens suspected and found to be disloyal and dangerous to our security after first being given fair hearings in which the elements of due process of law were observed. It is not to be presumed he would intentionally authorize a lawless discrimination against citizens on a wholesale scale because of their ancestral type. The order issued 31½ months after the outbreak of war. The evacuation was initiated on March 30, 1942, and was not completed until the latter part of August, 1942. Consequently, it cannot truthfully be asserted that there was insufficient time to examine each citizen suspect and prospective alien evacuee before his evacuation. There existed no legitimate reason to subject citizens to examination in the absence of specific charges being brought against them. Why should they be compelled to suffer the indignity of examination and be required to give an affirmative demonstration of their loyalty when we do not compel other citizens to submit to like examination and to give affirmative proof of their loyalty? Should we compel them to prove their loyalty just because a few ignorant agitators and jingoists accuse them of harboring dangerous thoughts? The accusers deserve to be examined. Are alien enemies and other citizens more to be trusted than Americans of Japanese descent just because they belong to so-called white

races? Must we always appease the agitators and
 jingoists? Are we to believe the presidential order
 was a concession to their demands? In so far as the
 order has been used to regulate the conduct of citizens
 on a discriminating basis it has neither Constitutional
 nor Congressional approval. By a fair interpretation
 of its language it cannot be construed to authorize
 either the banishment or detention of citizens. Neither
 Executive Order No. 9102, nor the rules and regula-
 tions of the W.R.A. referable thereto in so far as ap-
 plied to citizens conform to any standards set up by
 Congress within the rule established in *Schechter
 Poultry Corp. v. U. S.*, supra. They possess validity
 only in so far as they pertain to alien enemies. Can it
 be argued that the President and Congress are or that
 either is authorized by the Constitution to discriminate
 against loyal citizens on a race origin basis, to im-
 prison them indefinitely without trial, and, by adding
 insult to injury, to impose upon them a condition of
 slavery and involuntary servitude in the absence of
 crime upon their part?

**THE DOCTRINE OF THE EXHAUSTION OF ADMINISTRATIVE
 REMEDIES HAS NO APPLICATION HEREIN.**

It is under Executive Order No. 9102, that the
 W.R.A. adopted an amazing series of rules and regula-
 tions under which it exercises *supervision* over these
 prisoners. Supervision means the establishment of a
 provisional government over them which has consti-
 tutional sanction only in conquered or invaded enemy

territory. The administrative regulations pertaining to the various types of conditional and limited leave made available to successful applicants, after qualifying hurdles have been overcome, are published in the voluminous Federal Register. Before a confined citizen will be granted permission to leave these centers, an application to the Director for a "*leave clearance*" first must be made. No hearing is held on this application and its grant depends upon the whim and caprice of the Director who, in passing thereon, considers *secret reports* of the F.B.I. and other data concerning the applicant but of which the applicant has neither notice nor knowledge and, consequently, no opportunity to defend himself against charges. The types of leave available if a "*leave clearance*" is granted are termed "*short term*", "*seasonal work*" and "*indefinite*" leave. Each of these is subject not only to restrictions but to revocation. See Part 5, Chap. 1, Title 32, Code of Federal Regulations, as amended January 1, 1944. (9 F.R. 154.) See also, W.R.A. Manual, Chaps. 60 and 110. The "*indefinite leave*" is made contingent upon the applicant consenting to notify the Director of any change of residence and employment. It is made dependent not only upon whether an applicant has financial means or is capable of self-support but also upon whether the community in which he intends to reside is willing to tolerate his presence. The latter prerequisite is a novel condition to impose upon a citizen not charged with crime. The exploiters of "slave labor" view with satisfaction the action of a government which supplies them with the cheap labor

of servants recruited from concentration camps. The applications for a leave clearance and those for one of the types of restrictive leave as well as revocations of leave are determined without hearings and in a manner in which all the essential elements of due process of law are lacking.

In form and substance the leave of whatever type, if granted, is nothing but a limited probation or parole under which the appellant would be in constructive custody of the W.R.A. and restricted in her activities. As such it is a form of punishment. *Korematsu v. U. S.*, 319 U.S. 433. In addition, it is to be observed that she would be prohibited from re-entering the States-embracing military areas from which she has been excluded by General DeWitt and from "the Western Defense Command". She could not return to her home and could not be restored to her employment. She would still "*remain in the constructive custody of the Military Commander in whose jurisdiction lies the relocation center in which the applicant resides at the time the permit is issued*". See W.R.A. Administrative Instruction No. 22, par. 9, dated July 20, 1942. This instruction has been superseded but the fact of jurisdiction still obtains. At most the leave which might be granted to her by the W.R.A. would amount to nothing more than increasing the dimensions of her prison. The restraint upon her liberty is not lessened appreciably by increasing the size of her jail. Her detention would be nonetheless real were she to be granted this restrictive leave. Congress has never authorized the W.R.A. to enact rules making the appellant's release dependent upon whether she has

means of support, whether a community will tolerate her presence or upon any other condition. It has never granted the W.R.A. the authority to pass her into the constructive custody of a military commander. Consequently, the whole argument advanced that she must exhaust what the appellees cleverly term her "administrative remedies" as a condition precedent to the right to apply for a writ of habeas corpus disappears into the thin air from which it was spun.

The appellant applied for a "leave clearance" on February 19, 1943. Six months later, on August 23, 1943, the Director of the W.R.A. granted her application. The unreasonable delay taken by the Director is neither explained nor explainable. Caprice seldom is. The grant of the "leave clearance", a supposed first step toward limited freedom of an applicant, has none of the attributes of finality however. The grant of this supposed privilege in the instant case is a direct admission by the Director that the secret reports in his possession respecting the appellant demonstrate her to be a loyal citizen. *It is a finding by the Director that she is a loyal citizen.* Why then does this Director continue to detain her in unlawful custody? Is he an autocratic ruler? The appellant has not applied for one of the various types of conditional leave. Why should she? She reposes her faith and confidence in our Courts. She elects to be freed absolutely from illegal detention through the writ of habeas corpus as the one avenue of hope. Having admitted the loyalty of the appellant what cause has the Director to detain her? What reason can he offer?

Neither an increase in the size of her prison nor the relaxation of the restrictions involved in a grant of leave in anywise obviates the illegal detention. Only her release from the prison regardless of its size and the removal of the restraint imposed upon her so that she may return freely and without interference to her home and employment and pick up the normal threads of her life can nullify the illegality of the detention. Only the restoration of her absolute rights as an American citizen can wipe out the illegal detention. This means nothing short of restoring her to the status quo she occupied prior to her involuntary banishment.

The appellees evidently believe that illegal detention of a prisoner must consist either of confinement to a dungeon or a cell of a prison before habeas corpus lies. They seem to forget that it is the illegality of the commitment to which the form of restraint is incidental that the writ is directed. Peculiarly they seem to argue that a prisoner allowed the run of a courtyard, a trusty allowed to wander outside prison walls, a parolee granted a restricted leave and a probationer granted a conditional leave waive the remedy for an illegal commitment because they have elected to accept these administrative benefits from our modernized prison system. According to their argument the acceptance of these benefits upon terms the prison authorities may lay down is a condition precedent to the right to seek relief from illegal custody. This they have termed the doctrine of exhaustion of administrative remedies which they suggest must be followed

before a citizen's application for habeas corpus can be entertained.

An alien enemy, friendly to the United States, seeking the benefits of the W.R.A. leave permit might well be denied a right to seek a legal remedy in a Court of law for release from detention without first exhausting whatever administrative remedies might have been provided by the executive because jurisdiction over them in time of war is exercised under the Alien Enemy Act. It is unthinkable that a like jurisdiction can be exercised over citizens engaged in civilian occupations unless we are willing to acknowledge that our American government and civilization is a throwback to despotism and unless we are willing to admit that we have here the forerunner of what Italy and Germany experienced during the ascendancy of Mussolini and Hitler to power. The appellees, as W.R.A. authorities, paint a roseate picture of the life of these prisoners in the concentration camps. General DeWitt has done the same thing. From his *Final Report* which contains numerous posed photographs in its pictorial summary one might gain the impression that life in these camps is a satisfactory, happy and joyous one and that the inmates have never awakened to the realization they are living in cages. Neither the appellees nor the General appear to possess the inclination to portray the stark realities of life in a concentration camp. They should study the realism portrayed by Goya. Those who wreak injury never feel the pain and never understand the suffering.

In *U. S. v. Sing Tuck*, 94 U.S. 161, a case upon which the appellees have relied, Chinese seeking entry into this country under a claim of citizenship were required to exhaust statutory administrative remedies before invoking the aid of the Courts by habeas corpus. The "preliminary sifting process provided by statute by means of which their citizenship could be established was held to be a valid prerequisite to the grant of an application for habeas corpus. The "detention during time necessary for investigation" was temporary and was reasonable in duration. The administrative remedy was prompt and adequate. Had it not been adequate the writ would have issued. Of similar import is the recent case of *Falho v. U. S.*, 88 L. Ed. 248, where the validity of an administrative regulation sanctioned by Congress was attacked but not the constitutionality of the Selective Training and Service Act of 1940. Here, however, we are not concerned with proving the appellant is a citizen. It is admitted that she is and that she has not engaged in any criminal act. At the time of her imprisonment no administrative machinery had been set up to grant her adequate relief. None then was intended to be set up. None since has been set up. We are not seeking or attacking the prison fare, dole or limited leave benefits. we are attacking the whole illegal detention. Here we are concerned with a plot which resulted in the banishment and illegal detention of the appellant under a series of military orders issued in complete violation of the letter and spirit of the Constitution. Her detention is real: it is illegal. She has no adequate

remedy except by habeas corpus. If she tried to break away from her prison she would be shot by the armed guards who patrol outside. This would be a release from detention but not a judicial remedy for it. Apparently the appellees now argue that to gain a judicial remedy the appellant must play hide and seek with the executive officers responsible for her incarceration and detention, the officers doing the hiding and she the seeking.

Congress has never authorized the President or the W.R.A. to detain citizens under Executive Order No. 9102 or to establish a special provisional government over them consisting of administrative rules and regulations. It has no such power under the Constitution. A law creating power it cannot invoke cannot be invoked by the executive branch.

TWO AND A HALF YEARS OF GOVERNMENTAL APATHY IS TOO MUCH.

The Administration has had more than two years in which it could have had all these prisoners examined—two long years in which to give them fair and open hearings, to examine them and to segregate the disloyal ones, if any they found, from the loyal ones. How has it spent its time and to what purpose? What terrible policy has it followed that it has failed to release every loyal citizen by this time? It has blundered. It is muddled. The W.R.A. has been hampered by investigations conducted for political purposes and by administrative red tape. It is confused by its own

experiments. Its delay in ascertaining the loyalty of these citizens and giving them prompt release has caused dissatisfaction to arise—a small number of embittered prisoners to abandon all hope of ever being released and a smaller number to reach the conclusion that expatriation when peace comes is the only solution for their future welfare even though it means they will be classed as disloyal and be placed in a special prison, the Tule Lake Segregation Center.¹⁴ Under Administration prompting but with Administration fetters hampering it the W.R.A. went afishing for sharks but its record shows it caught nothing but minnows. Time is life and our public authorities seem to be wasting it away. Yes, the W.R.A. had two long years to achieve the purpose for which it was ordained but its work is still to be done.

¹⁴The condition precedent for a compulsory admission to the Tule Lake Segregation Center is a denial of leave clearance while detained in a relocation center. A transfer to this segregation center is tantamount to an implied classification that the transferee might be a disloyal person. A denial of leave clearance depends upon the whim and caprice of the Director of the W.R.A. It can be based upon rumor, hearsay and suspicion or upon no reason whatsoever. It can be based upon arbitrary factors which shock the conscience of sober-minded persons. The applicant, unaware of the nature of any accusation against him and in ignorance of the contents of the dossier maintained by the Director and without a hearing of any kind or chance to defend himself against rumor and unjust charges, is ordered transferred to this Tule Lake Segregation Center. See W.R.A. Manual, Chaps. 110 and 60.10. By regulation established October 15, 1943, a person detained in this center may reapply for leave clearance. See W.R.A. Handbook, Secs. 60.11.1 to 60.11.11 inc. A person is impliedly characterized as disloyal if he signifies an intention to be expatriated at the close of the war because of his prolonged detention and resultant impoverishment. What is to be expected of citizens who are jailed for nothing, who are denied a hearing and are kept in prison indefinitely? Isn't this punishment for harboring what the Director may imagine to be "dangerous thoughts"?

A strange contrast.

Contrast the W.R.A. record with that of an efficient department of government which experiences but little interference from the Administration. The Federal Bureau of Investigation took into custody thousands of alien enemies, Japanese, German and Italian, immediately following the outbreak of war. These aliens were given prompt individual hearings on the question of their loyalty to this country by the Department of Justice. The few found to be hostile to us were transferred to special internment camps policed by the Immigration authorities. Those found to be loyal or at least friendly to us and not dangerous to our security were liberated within a few weeks following their arrest.¹⁵ If the thousands of alien enemies suspected of being disloyal to us were examined in a short space of time at open hearings with a chance to defend themselves against charges of hostility and the great majority of them were found to be friendly to us and were released promptly, why is it that citizens whose loyalty either has been proven or ought to have been determined by this time are still denied fair and open hearings by competent tribunals and are yet detained in these concentration camps? Why is it that the military exclusion orders have not been cancelled? Is our Administration so confused it doesn't know what to do? The prolonged detention and impoverishment of loyal citizens is not a method by which patriotism and loyalty is sustained but one calculated

¹⁵ See the survey of the activities of the Attorney General issued during the week of December 1, 1942.

to dissipate patriotism and to breed disloyalty. These confined loyal citizens are not a menace to this nation. The serious menace to this nation and the great principles it represents arises from those professed loyal persons who condemn innocent persons to imprisonment not for cause but because of their type of ancestry. These pseudo-patriots, while shouting their own loyalty demonstrate by their acts and utterances a want of loyalty to the basic principles upon which this Republic was founded. If any persons deserve to be cooped up or quarantined as being dangerous to the principles of the Constitution it is these fascist-minded pseudo-patriots whose spiritual home is in a Nazi infested Europe.

Community hostility does not justify detention.

The appellees have declared that a considerable number of persons in the States in which evacuees were to be imprisoned held an attitude of hostility and suspicion toward them and that, consequently, this mass deportation and imprisonment was a species of *protective custody* designed for their benefit. Was it not Adolph Hitler who first made these words infamous? Have we not followed a pattern he first laid down for the treatment of non-Aryans? Should we take pride in it? The barbed-wire that surrounds these camps and the armed guards that patrol outside are not there for the purpose of preventing visitors from gaining admission but to prevent the prisoners from leaving. The appellees have intimated that perhaps it was a species of *preventive custody*, that is, a method designed to protect the evacuees from them.

selves or from inflicting harm upon others. These words also were made infamous by Hitler. Even a threatened lawless conduct upon the part of criminally inclined persons would not justify the segregation of their intended victims or the denial of their constitutional rights. See *Buchanan v. Warley*, 245 U.S. 69, 81, and *Hague v. C.I.O.*, 307 U.S. 496. However, if the government is seriously concerned about the protection of persons against the threats of criminals and confesses that it does not know how to cope with the problem it can be solved simply by converting these concentration camps into protectional camps for the benefit of those who feel they need such protection. Admission, however, would have to be invitational and departures at will.

The probability of community hostility to unsupervised relocation suggested by the appellees as a possible reason for this "protective custody" is sheer hypothesis based upon vague statements of various state officials who long were opposed to migratory workers entering their States for permanent residence. They welcomed them when the demand for labor to handle their seasonal crops exceeded their own labor supply. These states today are confronted with serious shortages in manpower in their agricultural and industrial fields and the press of reality would induce them to welcome workers regardless of race, color or creed. If community hostility would endanger these citizens it is obvious that the mobsters who would do them violence are the ones who ought to be reposing in prison. It certainly is a travesty on

our civilization to think that the lawless are at large while the law abiding are incarcerated. Are we to suppose there is merit in the argument that racial and religious minorities must be imprisoned because a governmental agency believes there is an undercurrent of hostility against them in a few communities? Since when has America recognized that the rank and file of her citizens are lawless and uncivilized? If mobsters found in society were to break out into the open a few shots by the police would be enough to disperse them. The lawless are usually those who possess the least courage when confronted with the violence they would inflict upon others. Napoleon used a whiff of grape-shot on a Paris mob and a revolution was ended. Since when has this Republic stood for the imprisonment of the innocent and harmless and the needless protection of the lawless? The appellees, in arguing that hostility might develop toward these people, seem to be unaware of the moral fiber and intelligence of the American people. They cannot cite a single example of physical harm inflicted upon any of these citizens or aliens by any lawless person or group during the interval between December 7, 1941, and the time of their evacuation or since then. The American public is not of a brutal breed. The appellees appear to be alone in their lack of confidence in the ability of our civil authorities to maintain law and order. Have their own sensibilities been so blunted they do not comprehend they have trifled with sacred rights and wronged a people without cause?

CONCLUSION.

The Constitution was born in a period of great spiritual upheaval. It was not intended to permit autocratic ruling within the framework of democratic processes. In the hands of its creators it was one thing—a thing of great beauty, designed to endure for ages. In the hands of its administrators and, all too frequently, in the hands of its interpreters it has become quite another thing, a warped and misshapen thing. It is as though it were an emblem set up as a fetish by the government which the people have been led to worship instead of the great principles it represents. Its guaranties are atrophying during a period of spiritual decline. Little minds which never understood its great purposes have hacked it away. Never having felt its inspiration they seem not to regret its loss. We must not lose sight of the historical fact that when the people are sheared of their liberties they never succeed in regaining the lost fleece. Yet is there time, a little time, in which the Constitution may be rescued. Upon our Courts the final effort to save it rests. If they fail us now, dictatorship will ride over the land and the bare symbol of liberty from which the spirit has departed will be left to beguile a gullible public.

Our total energy is harnessed to the war machine; the whole country is an immense arsenal. Each locality in our States is engaged in the production of war material or contributing in some measure to the national effort. Each contains national defense material, premises and utilities as defined in 50 USCA, Secs.

101, 104. It was for the protection of these against espionage and sabotage that Executive Order No. 9066, the military orders and the W.R.A. rules and regulations are asserted to have been devised. An examination of these statutes discloses that practically everything we produce in America, buildings, utilities, installations and equipment, highways of commerce, and all products of factory and field are included within the classification of national defense material, premises and utilities. It is obvious, therefore, that the Secretary of War, or a military commander however obscure, however incompetent, and however prejudiced may claim the right and power, under Executive Order No. 9066, to exclude any and all persons or classes of citizens from any part or the whole of the United States and to imprison them indefinitely. It is argued that this is due process of law under the 5th Amendment when the fact is that it is the negation of constitutional government. Whence does the executive branch derive the right to suspend the Constitution? It has no mandate from the People. Its action herein was a transparent device to seize power and to substitute its will for the will of the People. What it did here was not done with the consent of Congress and could not have been done with its consent. It transcended constitutional boundaries. What it did was an expression of autocratic power. What it has done to these 73,000 citizens it has done to all citizens. Are we a servile people upon whom our administrative servants may tread with impunity?

The areas from which the appellant and these peo-

If curfew regulations and travel restrictions had been imposed upon the excluded persons for a reasonable period of time while a genuine and prompt attempt was made by the authorities to ascertain if there were any spies or saboteurs in their midst it might have been argued that although the practice was abominable the motive at least was laudable. However, inasmuch as the forbidden areas take in approximately one-fourth of the geographical area of the continental United States and, in excess of two and one-half years has elapsed since the removal of these people, it must be concluded that the whole banishment and imprisonment program was instigated by the military commander and is continued by the appellees in an unreasonable, arbitrary and oppressive manner. It was and is wholly capricious. It was and is unnecessary. It was not and is not the product of sound judgment and discretion. If this terrible evacuation program is lawful constitutional government has lost its vitality and we are under the heels of a dictatorship.

If ever there was an excuse that might have been offered for a temporary detention of the appellant and these 73,000 citizens or of any friendly alien enemy it long ago ceased to have a basis in truth. Our shores are neither harried nor harassed by the enemy. Our victory in the Battle of Midway marked the ebb of Japanese aggression. Our military and naval authorities have rescinded the dim-out orders and have repeatedly announced that our Western shores are beyond the range of enemy action and are not expected to be attacked. We long have been on the

offensive and our enemies, European and Asiatic, on the defensive. Thousands of young Americans of Japanese ancestry have been serving in our armed forces with courage, loyalty and devotion. Their dead, our dead, have littered the isles of the South, Central and Western Pacific and the shores of Sicily and Italy. Thousands were serving before Pearl Harbor and additional thousands since have joined their ranks, laying down their lives on the altar of freedom. This altar has been stained by the fact that irresponsible persons at home have deprived the families of these youths of the very freedom for which these youths sacrifice their lives. By their deeds these young soldiers have demonstrated their loyalty and compel the conclusion that neither they nor their families should have been compelled to suffer the indignities of banishment and imprisonment and the terrible suffering these innocents have undergone and still undergo. Each of the questions certified to this Court should be answered in the negative. If the judgment of the Court below is not reversed and the writ ordered to issue we shall know that Justice has been dethroned and that Tyranny sits triumphant viewing the ruins of what once we had termed the Constitution and our Bill of Rights.

Dated, San Francisco, California,
September 14, 1944.

Respectfully submitted,

WAYNE M. COLLINS,

Attorney for Amicus Christ.

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CHARLES ELMORE DROFLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1944

No. 70

MITSUYE ENDO

against

MILTON EISENHOWER, Director of War Relocation Authority
and Wartime Civilian Control Administration.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

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OCTOBER TERM 1944

No. 70

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MILTON EISENHOWER, Director of War Relocation Authority
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BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

The American Civil Liberties Union is interested in this case because it affords an opportunity for this Court to mark out the extent of military and civilian control over citizens in wartime. There are three basic issues: whether citizens may be detained without judicial process; whether selection of these citizens may be determined on the basis of race; whether a citizen who has been unconstitutionally proceeded against and deprived of his or her liberty must submit to regulations promulgated by the authority which acted unconstitutionally and seek relief from that authority before proceeding in the courts.

The petition shows that petitioner is a native born citizen of the United States (R. 2) who, before her evacuation from California, had been certified as a permanent Civil Service employee of the State of California (R. 5). She seeks release from a camp established by the War Relocation Authority in which she is detained for the sole reason that she is an American citizen of Japanese ancestry (R. 4). The petition expressly states that she is being detained without any legal process ever having been issued

(R. 4) and that no hearing had ever been granted to her (R. 5). It is conceded by the Government in its brief that petitioner has been certified as loyal.

It appears from the affidavit of an employee of the War Relocation Authority, submitted in opposition to the application for writ of habeas corpus, that petitioner was removed to the War Relocation center pursuant to Executive Order No. 9066 and the public proclamations of Lt. Gen. DeWitt (R. 11). The executive order authorized the military commanders to take such steps as they thought desirable for the removal of residents from military areas. Gen. DeWitt issued various proclamations designating large sections of the Pacific Coast as military areas and ordering the evacuation from those areas of all persons of Japanese ancestry, citizens and aliens alike. These orders, while not contained in the present record, are matters concerning which the Court can take judicial notice. They are more fully set forth in the record in the *Korematsu* case being argued simultaneously with this one. The program of evacuation is fully described in a report published by the War Department entitled "Japanese Evacuation from the West Coast, 1942"; the essential documents are contained therein. It is clear from this report that the evacuation orders and the subsequent detention of the persons evacuated in relocation centers were all part of a combined program (see report, pp. 44ff, 78, 94, 237ff; see also a typical form of instructions printed at p. 99).

Opposition to the granting of the writ of habeas corpus rested primarily on the failure of petitioner to have sought leave to depart from the relocation center in accordance with regulations referred to in the affidavit (R. 11, 12). These regulations were promulgated in September, 1942, many months after the original evacuation and after the petition herein was signed (R. 10).

In reply petitioner's counsel called attention to the fact that no compliance with these regulations would have permitted petitioner to return to California, her residence and place of employment (R. 14).

Judge Roche, to whom the petition was presented, denied the same on the express ground that petitioner had not exhausted her administrative remedies under provisions of Executive Order 9102 and the regulations promulgated under it (R. 15). Executive Order 9102 was the order which established the War Relocation Authority.

On this state of facts there are three questions to be considered by the Court:

1. Can citizens be detained by administrative order?
2. Can detention of citizens be justified solely on the ground that they are descended from persons whose fellow nationals are enemy aliens?
4. Must a citizen who is detained against her will without judicial process comply with regulations issued by the detaining authority before she can obtain relief in the courts?

POINT I

The government has no power to detain a citizen against whom no criminal charges have been preferred.

We submit that no power has been granted by the Congress or can constitutionally be granted to any agency of government to detain citizens indefinitely without the formulation against them of any charges whatever. A fortiori is this the case if the evacuation orders themselves were invalid, orders which are being challenged in the *Korematsu* case. But even if the original evacuation might have been justified by the military situation which then existed there was no possible military justification for the continued detention of American citizens. Indeed, it does not appear from the record that military authorities participated in the continued detention. And General DeWitt has said that detention was not motivated by military considerations (1942 Report, pp. 43, 105, 243, 246).

1. We submit that Congress gave neither to the President nor to any authority of government any power so far reaching. The law (56 Stat. 173), which punishes violations of military orders, certainly is not capable of being construed as authority to detain citizens. And this Court's decision in the *Hirabayashi* case (320 U. S. 81) does not so hold; for it dealt only with curfew orders which were explicitly referred to at the time the law was under consideration. It is not enough to conclude that evacuation, which was also under contemplation, and was expressly referred to in the law, was authorized. For here we are dealing, not with evacuation, but with detention.

Some attempt was made by the government in the *Hirabayashi* case to argue that the action taken was ratified by Congressional appropriation for the War Relocation Authority. We cannot believe that the appropriation of money to take care of people who have been unfortunately transported from their homes and places of business can be deemed Congressional approval of the method by which they were removed nor their subsequent detention against their will. It must not be forgotten that large numbers of those moved and detained must necessarily have been content to remain where they were, lacking any assurance that they could find means of support elsewhere. Under circumstances such as these no ratification can be inferred. Any other doctrine would force Congress to withhold relief in situations where relief was urgently needed.

2. We submit also that the war power of the President alone would not support such detention. This Court in effect so ruled in *Brown v. United States*, 8 Cranch. 110. That case dealt with a Presidential attempt to seize British owned property during the war of 1812. Chief Justice Marshall ruled that since Congress had given the President the right to detain enemy aliens, but not the right to seize their property, his act was without support in the law. It follows by like reasoning that since Congress has given

the President power to detain enemy aliens (50 U. S. C. A. 21), but has not given the President similar power to detain citizens, the detention here sought to be reviewed cannot be sustained on the President's war power alone.

Writers on the subject have reached the same conclusion. Thus in Berdahl, *War Powers of the Executive in the United States*, it is nowhere suggested that those powers extend to the removal of citizens from one part of the United States to the other. It is only when martial law has been declared that executive authority may be exercised over citizens. Of course, there was no martial law in California. In Chapter 11, pages 183 and following, Mr. Berdahl discusses the President's power of police control and recognizes that such power over persons is derived only from Congressional authorization. The most that he concedes is that when Congress is not in session the President may have power to act in an emergency (p. 192). Here Congress was continuously in session.

3. Finally, we submit that even the President and Congress, acting together, may not indefinitely detain citizens of the United States against whom no charges have been preferred. The framers of the Constitution recognized the propensity of governments in times of crisis to take executive action rather than to pursue the ordinary course of the criminal law. They realized that in certain situations such conduct was necessary to the maintenance of government. For that reason the framers permitted the suspension of the writ of habeas corpus by which unlawful executive detention was normally challenged, but permitted such suspension only in time of invasion or insurrection (Const., Art. I, Sec. 9). They did not permit the suspension merely because of the existence of a state of war, or even because of a fear of invasion. It was evidently contemplated that the detention permissible as the result of the suspension of the writ of habeas corpus should be

possible only at a time of the direst immediate emergency, not at all as a precautionary measure. If, as we think must be conceded, the situation in California in 1942 and 1943 would not have warranted the suspension of the writ of habeas corpus, then it must follow that any legislation seeking to circumvent the prohibition against the suspension of habeas corpus would be void. And any legislation directly authorizing the detention of citizens, except as the result of charges preferred under the criminal laws, would be an attempt to evade the prohibition against the suspension of the writ.

We do not believe that Congress intended to evade the constitutional prohibition against the suspension of the writ of habeas corpus. Certainly Congress has not expressly attempted to do so, and we maintain that even if Congress had expressly attempted to do so, its action would be void.

The Government in its brief seeks to justify the continued detention of petitioner and other American citizens of Japanese descent, on the ground that this detention is necessary to protect them against possible injury from the inhabitants of states to which they might migrate. This is the outrageous doctrine of "protective custody" invented by the Nazis in their persecution of the Jews. It has no place in American life.

There is also the suggestion that the Constitution does not forbid temporary confinement of persons even when they are not charged with crimes. Detention of jurors and witnesses is referred to (Brief, p. 76). The situation there is not in the least analogous. The detention of jurors and witnesses is for very limited purposes and limited time. Likewise *Moyer v. Peabody*, 212 U. S. 78, is cited and the British legislation referred to (p. 78). These various references at the most might justify the continued detention of American citizens of Japanese ancestry who have been found to be disloyal and therefore dangerous. That is not the case here, as petitioner has been expressly ad-

mitted in the brief to be loyal and not dangerous. In all of the situations discussed by the Government, there was some particular reason why the particular individual had to be temporarily detained; indiscriminate detention of a large group of persons has never been justified in our history and should not be justified now.

We submit, therefore, that there is no basis under our constitutional system for the indefinite detention of American citizens even during wartime unless charges are preferred against them under the safeguards contained in the Fifth and Sixth Amendments to the Constitution. That being so, the writ of habeas corpus should have been issued, so that the District Court could determine whether or not petitioner was in fact, as she alleges, being detained without due process of law.

POINT II

The classification of citizens based solely on ancestry is a denial of due process and is forbidden by the Fifth Amendment.

We recognize, of course, that the Federal Government, unlike the states, is not subject to any express limitation in the selection of subjects or persons to be dealt with by government action; in other words, that the Constitution contains no equal protection clause affecting the Federal Government. Nevertheless, the due process clause of the Fifth Amendment does limit the power of the Federal Government in respect to classification (see *Detroit Bank v. United States*, 317 U. S. 329, 337 and cases cited). In the *Hirabayashi* case this Court recognized that classification on racial grounds is ordinarily arbitrary. While the Chief Justice concluded that the fact of racial ancestry was relevant so as to justify the imposition of a curfew order on citizens of Japanese origin only, he was careful to point out that the Court did no more than determine

that the circumstances afforded a reasonable basis for the action taken in imposing a curfew. He said:

"We decide only that the curfew order, as applied, at the time it was applied, was within the boundaries of the war power."

And Mr. Justice Murphy, specially concurring, said that the decision then being rendered went "to the very brink of constitutional power".

We do not believe that the considerations which led this Court to uphold discrimination in the application of a curfew order are applicable to the situation that is here in question. There are important differences in the character of the action taken and in the time when it was taken. The curfew order was imposed on March 24, 1942, to be effective within three days. It covered not only citizens of Japanese ancestry, but all enemy aliens, Japanese, German and Italian alike. It had an obvious immediate relation to the prevention of sabotage, and perhaps also to the possibility of invasion. It operated only as a minor restraint of liberty during the hours of darkness, when it was reasonable to suppose that attempts at sabotage would be most likely and assistance to a possible invader could most easily be given.

Altogether different are the various evacuation and detention orders. These were issued over a considerable period of time, thus indicating the absence of any acute emergency calling for instant action. They were directed only against persons of Japanese ancestry, not against enemy aliens of different origin. They were not limited to preventing the persons affected from entering military establishments, or even places which the military might consider necessary for defense purposes. Instead, they directed removal of all persons of Japanese ancestry from their homes and places of business throughout the entire Pacific Coast area for a depth in places of 200 miles. Moreover, these orders prevented persons affected from voluntarily leaving the areas and required them to submit to forced assembly in camps and to ultimate detention.

We do not believe that the same circumstances of "ethnic affiliations with an invading enemy"—to quote a portion of the Chief Justice's opinion, which we cannot but feel was unfortunately phrased—can form the basis for the discrimination here practiced.

Whereas the curfew order was imposed on all enemy aliens, evacuation and detention were restricted only to the Japanese. Whatever the justification for including citizens of Japanese ancestry as well as aliens within the scope of the curfew order, there can be no justification for providing for the wholesale evacuation and detention of citizens of Japanese ancestry, while leaving even enemy aliens of German and Italian origin completely unaffected.

No considerations of relevancy can justify that result. Certainly, the action cannot be justified as a measure of protection against sabotage, for the danger of sabotage was a countrywide danger. It was in no way restricted to the Pacific Coast. And it was a danger even more to be feared from persons of German or Italian extraction, because of the greater likelihood of access on their part to places where sabotage might be fruitful. The very strangeness of appearance of persons of Japanese ancestry rendered the possibility of sabotage on their part less likely. Nor can fear of invasion be asserted as justification for continued detention after that fear no longer operated.

Whatever view this Court may take of the evacuation orders it is perfectly apparent that at the time the application for writ of habeas corpus was heard in July, 1943 (R. 16), the successful prosecution of the war did not require any such cruel and arbitrary interference with the freedom of American citizens as was here accomplished and so far has been judicially sanctioned.

POINT III

The doctrine of exhaustion of administrative remedies has no application here.

The District Court denied the application for writ of habeas corpus on the express ground that petitioner had not exhausted her administrative remedies (R. 15). We submit that petitioner's right to challenge the constitutionality of her detention cannot be affected by her refusal to apply for relief to the agency which is unconstitutionally detaining her. The doctrine that the courts will not interfere with the acts of administrative agencies until all administrative procedures have been exhausted is appropriate when applied to an administrative agency lawfully created by the Congress and expressly charged with the exclusive function of determining the applicability to particular facts of general rules laid down by the Congress. The doctrine can have no proper application where the claim is made that Congress exceeded its constitutional powers in setting up the agency or where Congress has not expressly made the agency determination final and exclusive, nor should the doctrine be applied where Congress has laid down no rules of law to guide the agency in dealing with particular cases.

While the Government in its brief disclaims any intention of supporting the District Court's decision on this point, the brief nevertheless does seek to justify the continued detention of petitioner because she refused to apply for permission to leave. The Government makes clear in its brief that leave could be obtained only by a person who could show that he could obtain a job and secure community acceptance and who would agree to report periodically to the War Relocation Authority. No statutory authority for any such requirements is suggested. Despite the Government's original disclaimer therefor, we believe it appropriate to discuss the subject more fully.

1. No case can be found in which this Court has ever refused to consider the constitutionality of an Act of Congress or an agency created by Congress because of the failure of the person aggrieved to exhaust administrative remedies. Cases such as *Falbo v. United States*, 320 U. S. 544, and *Yakus v. United States*, 321 U. S. 414, are in no way similar to the situation here presented. In the *Falbo* case the constitutionality of the Selective Service Act was not questioned; the only question before this Court was whether or not the claimed arbitrary action of a draft board in passing up on the facts of a particular case could be challenged in a criminal prosecution or in a habeas corpus proceeding. In the *Yakus* case the constitutionality of the statute was attacked and this Court considered and disposed of all of the contentions there made. Since the Court sustained the Act and the procedure therein set up, it necessarily concluded that such procedure had to be followed. In the case at bar Congress set up no procedure and the constitutionality of the detention is challenged. When this Court held the N. R. A. unconstitutional in *Schechter Poultry Co. v. United States*, 295 U. S. 495, it did not concern itself with the possibility that the defendant in that case might have obtained relief from the restriction complained of by compliance with some administrative procedure.

There is nothing in what Mr. Justice Douglas said in *Hirabayashi v. United States*, 320 U. S. 81, 108, 109, which affects the problem here presented. There the defendant had defied the regulation and sought to question its application to him on a criminal trial. Here petitioner complied with the regulation by being evacuated and has sought to question the validity of her continued detention by habeas corpus proceedings.

2. Moreover, we submit that the doctrine of exhaustion of administrative remedies can apply only where Congress has expressly provided for administrative action and determined that it should be final or exclusive. That was the real reason for the decision in both the *Falbo* and *Yakus*

cases. In the absence of such Congressional declaration the courts are always open for the redress of grievances (see *Moore v. Illinois Central Railroad Company*, 312 U. S. 630).

3. We submit that the doctrine of exhaustion of administrative remedies cannot apply here in any event since the Congress has laid down no standards by which the administrative agency could make a determination in a particular case. Had Congress provided that all American citizens of Japanese ancestry might be detained until an administrative agency could determine whether or not they were loyal and provided also for the unconditional release of those determined to be loyal, then the case would be quite different. If this Court should hold legislation of that type constitutional it would be appropriate to require that any individual should apply to the agency to be classified. Then the individual could appeal to the courts only if the action of the agency was arbitrary. But in the absence of such Congressional declaration of policy, we submit that it would be wholly improper to apply here the doctrine of exhaustion of administrative agencies.

These observations are particularly pertinent here when one considers the possible effect of compliance with the regulations. These regulations (R. 12) do not provide for a hearing on the loyalty of persons detained with provision for the release of those found to be loyal. As this Court well knows the loyalty hearings which were held by the W. R. A. had the effect merely of segregating one group of citizens of Japanese descent from another, but both groups continued to be detained. The regulations invoked in this case provide only for leaves from the camps, leaves, moreover, for limited purposes. What petitioner is seeking by the writ of habeas corpus is her complete release from any control by the War Relocation Authority. That she could not have accomplished by compliance with the regulations.

There can, therefore, be no valid basis for the contention that petitioner's application for a writ of habeas corpus was properly denied because she had failed to exhaust administrative remedies.

POINT IV

The case is not moot.

The Government has suggested in its brief that the case has become moot, because after the decision in the District Court, petitioner was moved out of the jurisdiction of that court. Since, however, petitioner remains under control of the War Relocation Authority, a representative of which was and still is within the jurisdiction of the District Court, there is no basis in law for the Government's contention.

It is the general rule that if a court had jurisdiction at the time that the writ was applied for, no change in the custody of the applicant for the writ can defeat that jurisdiction. Such was the precise decision of the Third Circuit in *Ex parte Catanzaro*, 138 F. 2d 100. That jurisdiction over the person in charge of the applicant, rather than the physical whereabouts of that applicant is the determining jurisdictional factor is settled in both Federal and State courts. In addition to the cases referred to by the Government in its brief (p. 52), we call attention to *Rivers v. Mitchell*, 57 Iowa 193; *People ex rel. Billotti v. N. Y. Asylum*, 57 App. Div. 383; and *People ex rel. Dunlap v. New York Asylum*, 58 App. Div. 133.

Judge Cooley expressed the basic thought in the *Jackson* case, 15 Michigan 417, 439:

"The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves

it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. . . . The place of confinement is therefore not important to the relief, if the guilty party is within the reach of process, so that by the power of the court he can be compelled to release his grasp."

This Court has never decided to the contrary. There is no basis for the contention made by the Government in its brief (p. 47) that this Court recently dismissed two petitions for writs of habeas corpus under similar circumstances. The cases there cited, *U. S. ex rel. Inness v. Crystal*, 319 U. S. 755, and *U. S. ex rel. Lynn v. Downer*, 322 U. S. (No. 941, October Term 1943), now pending on application for rehearing, were entirely different. In the *Inness* case, relator sought to challenge the judgment of a court martial. Pending appeal, he was removed from the custody of the army to the prison where he was to serve his sentence. No order directed to an army officer could therefore bring about his discharge from imprisonment. In the *Lynn* case, the situation was somewhat similar, although there the relator continued always to be under army custody; therefore, while the particular respondent originally proceeded against might not have been able to procure relator's release upon a court order, his direct superior could have done so. If this Court should deny the pending application for rehearing in that case, we submit that the decision should be confined to the particular facts of the case and not be extended so as to permit jurisdiction to be defeated by the removal of an applicant for a writ of habeas corpus from place to place while the applicant remains under the same basic custody. No other rule is consonant with justice, since otherwise the person proceeded against could always thwart judicial proceedings.

We submit, therefore, that the case has not become moot.

CONCLUSION

It is respectfully submitted that this Court should declare continued detention of American citizens as here practiced to be unconstitutional and direct the issuance of a writ of habeas corpus so as to require the War Relocation Authority to justify, if it can, its detention of this petitioner.

Respectfully submitted,

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as amicus curiae,

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SUPREME COURT OF THE UNITED STATES.

No. 70.—OCTOBER TERM, 1944.

On Certificate from the United States
Ex parte Mitsuye Endo. } Circuit Court of Appeals for the
Ninth Circuit.

[December 18, 1944.]

Mr. Justice DOUGLAS delivered the opinion of the Court.

This case comes here on a certificate of the Court of Appeals for the Ninth Circuit, certifying to us questions of law upon which it desires instructions for the decision of the case. Judicial Code § 239, 28 U. S. C. § 346. Acting under that section we ordered the entire record to be certified to this Court so that we might proceed to a decision, as if the case had been brought here by appeal.

Mitsuye Endo, hereinafter designated as the appellant, is an American citizen of Japanese ancestry. She was evacuated from Sacramento, California, in 1942, pursuant to certain military orders which we will presently discuss, and was removed to the Tule Lake War Relocation Center located at Newell, Modoc County, California. In July, 1942, she filed a petition for a writ of habeas corpus in the District Court of the United States for the Northern District of California, asking that she be discharged and restored to liberty. That petition was denied by the District Court in July, 1943, and an appeal was perfected to the Circuit Court of Appeals in August, 1943. Shortly thereafter appellant was transferred from the Tule Lake Relocation Center to the Central Utah Relocation Center located at Topaz, Utah, where she is presently detained. The certificate of questions of law was filed here on April 22, 1944, and on May 8, 1944, we ordered the entire record to be certified to this Court. It does not appear that any respondent was ever served with process or appeared in the proceedings. But the United States Attorney for the Northern District of California argued before the District Court that the petition should not be granted. And the Solicitor General argued the case here.

The history of the evacuation of Japanese aliens and citizens of Japanese ancestry from the Pacific coastal regions, following

the Japanese attack on our Naval Base at Pearl Harbor on December 7, 1941, and the declaration of war against Japan on December 8, 1941 (55 Stat. 795), has been reviewed in *Hirabayashi v. United States*, 320 U.S. 81. It need be only briefly recapitulated here. On February 19, 1942, the President promulgated Executive Order No. 9066, 7 Fed. Reg. 1407. It recited that

"the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities as defined in Section 4, Act of April 26, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U. S. C., Title 50, Sec. 104)."

And it authorized and directed

"the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order."

Lt. General J. L. De Witt, Military Commander of the Western Defense Command, was designated to carry out the duties prescribed by that Executive Order. On March 2, 1942, he promulgated Public Proclamation No. 1 (7 Fed. Reg. 2320) which recited that the entire Pacific Coast of the United States,

"by its geographical location is particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations."

It designated certain Military Areas and Zones in the Western Defense Command and announced that certain persons might subsequently be excluded from these areas. On March 16, 1942,

General De Witt promulgated Public Proclamation No. 2 which contained similar recitals and designated further Military Areas and Zones. 7 Fed. Reg. 2405.

On March 18, 1942, the President promulgated Executive Order No. 9102 which established in the Office for Emergency Management of the Executive Office of the President the War Relocation Authority. 7 Fed. Reg. 2165. It recited that it was made "in order to provide for the removal from designated areas of persons whose removal is necessary in the interests of national security." It provided for a Director and authorized and directed him to

"formulate and effectuate a program for the removal, from the areas designated from time to time by the Secretary of War or appropriate military commander under the authority of Executive Order No. 9066 of February 19, 1942, of the persons or classes of persons designated under such Executive Order, and for their relocation, maintenance, and supervision."

The Director was given the authority, among other things, to prescribe regulations necessary or desirable to promote effective execution of the program.

Congress shortly enacted legislation which, as we pointed out in *Hirabayashi v. United States*, *supra*, ratified and confirmed Executive Order No. 9066. See 320 U. S. pp. 87-91. It did so by the Act of March 21, 1942 (56 Stat. 173) which provided:

"That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$5,000 or to imprisonment for not more than one year; or both, for each offense."

Beginning on March 24, 1942, a series of 108 Civilian Exclusion Orders were issued by General De Witt pursuant to Public Pro-

¹ Civilian Exclusion Orders Nos. 1 to 99 were ratified by General De Witt's Public Proclamation No. 7 of June 8, 1942 (7 Fed. Reg. 4498) and Nos. 100 to 108 were ratified by Public Proclamation No. 11 of August 18, 1942. 7 Fed. Reg. 6703.

lamation Nos. 1 and 2. Appellant's exclusion was effected by Civilian Exclusion Order No. 52, dated May 7, 1942. It ordered that "all persons of Japanese ancestry, both alien and non-alien" be excluded from Sacramento, California,² beginning at noon on May 16, 1942. Appellant was evacuated to the Sacramento Assembly Center on May 15, 1942, and was transferred from there to the Tule Lake Relocation Center on June 19, 1942.

On May 19, 1942, General De Witt promulgated Civilian Restrictive Order No. 1 (8 Fed. Reg. 982) and on June 27, 1942, Public Proclamation No. 8. 7 Fed. Reg. 8346. These prohibited evacuees from leaving Assembly Centers or Relocation Centers except pursuant to an authorization from General De Witt's headquarters. Public Proclamation No. 8 recited that "the present situation within these military areas requires as a matter of military necessity" that the evacuees be removed to "Relocation Centers for their relocation, maintenance and supervision", that those Relocation Centers be designated as War Relocation Project Areas, and that restrictions on the rights of the evacuees to enter, remain in, or leave such areas be promulgated. These restrictions were applicable to the Relocation Centers within the Western Defense Command³ and included both of those in which appellant has

² By Public Proclamation No. 4, dated March 27, 1942 (7 Fed. Reg. 2601) General De Witt had ordered that all persons of Japanese ancestry who were within the limits of Military Area No. 1 (which included the City of Sacramento) were prohibited "from leaving that area for any purpose until and to the extent that a future proclamation or order of this headquarters shall so permit or direct."

Prior to this Proclamation a system of voluntary migration had been in force under which 4,889 persons left the military areas under their own arrangements. Final Report, Japanese Evacuation from the West Coast (1943), p. 109. The following reasons are given for terminating that program:

"Essentially, the objective was twofold. First, it was to alleviate tension and prevent incidents involving violence between Japanese migrants and others. Second, it was to insure an orderly, supervised, and thoroughly controlled evacuation, with adequate provision for the protection of the persons of evacuees as well as their property."

Final Report, *supra*, p. 105.

³ Six War Relocation Centers and Project Areas were established within and four outside the Western Defense Command. See Final Report, *supra*, note 2, Part VI. Each one which was outside the Western Defense Command was designated as a military area by the Secretary of War in Public Proclamation No. WD1, dated August 13, 1942. That proclamation provided that all persons of Japanese ancestry in those areas were required to remain there unless written authorization to leave was obtained from the Secretary of War or the Director of the War Relocation Authority. 7 Fed. Reg. 6593. It

been confined—Tule Lake Relocation Center at Newell, California and Central Utah Relocation Center at Topaz, Utah. And Public Proclamation No. 8 purported to make any person who was subject to its provisions and who failed to conform to it liable to the penalties prescribed by the Act of March 21, 1942.

By letter of August 11, 1942, General De Witt authorized the War Relocation Authority⁴ to issue permits for persons to leave these areas. By virtue of that delegation⁵ and the authority conferred by Executive Order No. 9102, the War Relocation Authority was given control over the ingress and egress of evacuees from the Relocation Centers where Mitsuye Endo was confined.⁶

It is stated that the United States was subject to "espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations emanating from within as well as from without the national boundaries." And it also purported to make any person who was subject to its provisions and who failed to obey it liable to the penalties prescribed by the Act of March 21, 1942.

The letter of August 11, 1942, is printed in the Final Report, *supra*, note 2, p. 530. It recited that the delegation of authority was made pursuant to the provisions of Public Proclamation No. 8, dated June 27, 1942. Later General De Witt described the supervision of Relocation Centers by the War Relocation Authority as follows:

"The initial problem was one of security—the security of the Pacific Ocean. The problem was met by evacuation to Assembly Centers followed by a transfer to Relocation Centers. The latter phase—construction, supply, equipment of Relocation Centers and the transfer of evacuees from Assembly to Relocation Centers had been accomplished by the Army. (While the Commanding General was made responsible for this latter phase of the program, in so doing, he was accomplishing a mission of the War Relocation Authority rather than strictly an Army mission.) The second problem—national in scope—essentially a social-economic problem, was primarily for solution by the War Relocation Authority, an agency expressly created for that purpose."

Final Report, *supra*, note 2, p. 246.

On February 16, 1944, the President by Executive Order No. 9423 transferred the War Relocation Authority to the Department of the Interior. 9 Fed. Reg. 4903. The Secretary of the Interior by Administrative Order No. 922, dated February 16, 1944, authorized the Director to perform under the Secretary's supervision and direction the functions transferred to the Department by Executive Order No. 9423.

⁵ And see the Delegation of authority contained in the Secretary of War's Proclamation WD-1 of August 13, 1942, *supra*, note 3, respecting Relocation Centers outside the Western Defense Command.

⁶ The Commanding General retained exclusive jurisdiction over the release of evacuees for the purpose of employment, resettlement, or residence within Military Area No. 1 and the California portion of Military Area No. 2. See Final Report, *supra*, note 2, p. 242. As to the Relocation Centers situated within the evacuated zone, the Commanding General regulated "the conditions of travel and movement through the area." *Id.*

"The Commanding General recognized fully that one of the principal responsibilities of War Relocation Authority was properly to control

The program of the War Relocation Authority is said to have three main features: (1) the maintenance of Relocation Centers as interim places of residence for evacuees; (2) the segregation of loyal from disloyal evacuees; (3) the continued detention of the disloyal and so far as possible the relocation of the loyal in selected communities.⁷ In connection with the latter phase of its work the War Relocation Authority established a procedure for obtaining leave from Relocation Centers. That procedure, so far as indefinite leave⁸ is concerned, presently provides⁹ as follows:

Application for leave clearance is required. An investigation of the applicant is made for the purpose of ascertaining "the probable effect upon the war program and upon the public peace and security of issuing indefinite leave" to the applicant.¹⁰ The

ingress and egress at Relocation Centers. The exercise of such control by Army authorities would have been tantamount to administering the Centers themselves. While the Commanding General retained exclusive control to regulate and prohibit the entry or movement of any Japanese in the evacuated areas, he delegated fully the authority and responsibility to determine entry to and departure from the Center proper." *Id.*

⁷ The functioning of Relocation Centers is described in the Final Report, *supra* note 2, Part VI and in Segregation of Loyal and Disloyal Japanese in Relocation Centers, Sen. Doc. No. 96, 78th Cong., 1st Sess., pp. 4-25.

⁸ Provision was also made for group leave (or seasonal work leave) and short term leave not to exceed 60 days. See Sen. Doc. No. 96, *supra*, note 7, p. 17.

⁹ The first leave procedure was contained in Administrative Instruction No. 22, dated July 20, 1942. It provided in short that any citizen of Japanese ancestry who had never resided or been educated in Japan could apply for a permit to leave the Relocation Center if he could show that he had a specific job opportunity at a designated place outside the Relocation Center and outside the Western Defense Command. Every permittee was said to remain in the "constructive custody" of the military commander in whose jurisdiction the Relocation Center was located. The permit could be revoked by the Director and the permittee required to return to the Relocation Center if the Director found that the relocation was necessary "in the public interest". The Regulations of September 26, 1942, provided more detailed procedures for obtaining leave. Sec 7 Fed. Reg. 7656. Administrative Instruction No. 22 was revised November 6, 1942. It was superseded as a supplement to the Regulations by the Handbook of July 26, 1943. The Regulations of September 26, 1942 were revised January 1, 1944. See 9 Fed. Reg. 154.

¹⁰ Handbook, § 60.6. Nine factors are specified each of which is regarded by intelligence agencies as sufficient to warrant a recommendation that leave clearance be denied unless there is an adequate explanation". See 60.10.2. These include, among others, a failure or refusal to swear unqualified allegiance to the United States and to forswear any form of allegiance to the Japanese Emperor or any other foreign government, power, or organization; a request for repatriation or expatriation whether or not subsequently retracted; military training in Japan; employment on Japanese naval vessels; three trips to Japan after the age of six, except in the case of seamen whose trips were confined to ports of call; an organizer, agent, member, or contributor to specified organizations which intelligence agencies consider subversive.

grant of leave clearance does not authorize departure from the Relocation Center. Application for indefinite leave must also be made. Indefinite leave may be granted under 14 specified conditions.¹¹ For example, it may be granted (1) where the applicant proposes to accept an employment offer or an offer of support that has been investigated and approved by the Authority; or (2) where the applicant does not intend to work but has "adequate financial resources to take care of himself" and a Relocation Officer has investigated and approved "public sentiment at his proposed destination", or (3) where the applicant has made arrangements to live at a hotel or in a private home approved by a Relocation Officer while arranging for employment; or (4) where the applicant proposes to accept employment by a federal or local governmental agency; or (5) where the applicant is going to live with designated classes of relatives.

But even if an applicant meets those requirements, no leave will issue when the proposed place of residence or employment is within a locality where it has been ascertained that "community sentiment is unfavorable" or when the applicant plans to go to an area which has been closed by the Authority to the issuance of indefinite leave.¹² Nor will such leave issue if the area where the applicant plans to reside or work is one which has not been cleared for relocation.¹³ Moreover, the applicant agrees to give the Authority prompt notice of any change of employment or residence. And the indefinite leave, which is granted does not permit entry into a prohibited military area, including those from which these people were evacuated.¹⁴

¹¹ Handbook, § 60.4.3.

¹² *Id.*

¹³ *Id.* The War Relocation Authority also recommends communities in which an evacuee will be accepted, renders aid in finding employment opportunities, and provides cash grants, if needed, to assist the evacuee in reaching a specified destination and in becoming established there. The Authority has established eight area offices and twenty-six district offices to help carry out the relocation program.

¹⁴ Sec. 60.4.8 of the Handbook provides:

"Before any indefinite leave permitting any entry into or travel in a prohibited military area may issue, a written pass or authorization shall be procured for the applicant from the appropriate military authorities and an escort shall be provided if required by the military authorities. Such pass or authorization may be procured through the Assistant Director in San Francisco, or in the case of the Manzanar Relocation Center through the commanding officer of the military police at the center to the extent authorized by the Western Defense Command."

Mitsuye Endo made application for leave clearance on February 19, 1943, after the petition was filed in the District Court. Leave clearance¹⁵ was granted her on August 16, 1943. But she made no application for indefinite leave.¹⁶

Her petition for a writ of *habeas corpus* alleges that she is a loyal and law-abiding citizen of the United States, that no charge has been made against her, that she is being unlawfully detained, and that she is confined in the Relocation Center under armed guard and held there against her will.

It is conceded by the Department of Justice and by the War Relocation Authority that appellant is a loyal and law-abiding citizen. They make no claim that she is detained on any charge or that she is even suspected of disloyalty. Moreover, they do not contend that she may be held any longer in the Relocation Center. They concede that it is beyond the power of the War Relocation Authority to detain citizens against whom no charges of disloyalty or subversiveness have been made for a period longer than that necessary to separate the loyal from the disloyal and to provide the necessary guidance for relocation. But they maintain that detention for an additional period after leave clearance has been

¹⁵ The leave clearance stated that it did not authorize departure from the Relocation Center. It added:

"You are eligible for indefinite leave for the purpose of employment or residence in the Eastern Defense Command as well as in other areas provided the provisions of Administrative Instruction No. 22, Rev., are otherwise complied with. The Provost Marshal General's Dept. of the War Department has determined that you, Endo Mitsuye are not at this time eligible for employment in plants and facilities vital to the war effort."

¹⁶ The form of a citizen's indefinite leave is as follows:

"This is to certify that a United States citizen, who has submitted to me sufficient proof of such citizenship, residing within Relocation Area, is allowed to leave such area on 19 and subject to the terms of the regulations of the War Relocation Authority relating to the issuance of leave for departure from a relocation area and subject to restrictions ordered by the United States Army, and subject to any special conditions or restrictions set forth on the reverse side hereof, to enjoy leave of indefinite duration."

One of the grounds given by the District Court for denial of the petition for writ of *habeas corpus* was the failure of appellant to exhaust her administrative remedies. The Solicitor General and the War Relocation Authority do not invoke that rule here, since the issue which appellant poses the validity of the regulations under which the administrative remedy is prescribed.

granted is an essential step in the evacuation program. Reliance for that conclusion is placed on the following circumstances.

When compulsory evacuation from the West Coast was decided upon, plans for taking care of the evacuees after their detention in the Assembly Centers, to which they were initially removed, remained to be determined. On April 7, 1942, the Director of the Authority held a conference in Salt Lake City with various state and federal officials including the Governors of the intermountain states.¹⁷ Strong opposition was expressed to any type of unsupervised relocation and some of the Governors refused to be responsible for maintenance of law and order unless evacuees brought into their States were kept under constant military surveillance.¹⁸ Sen. Doc. No. 96, *supra*, note 7, p. 4. As stated by General De Witt in his report to the Chief of Staff:

Essentially, military necessity required only that the Japanese population be removed from the coastal area and dispersed in the interior, where the danger of action in concert during any attempted enemy raid along the coast, or in advance thereof as preparation for a full scale attack, would be eliminated. That the evacuation program necessarily and ultimately developed into one of complete Federal supervision, was due primarily to the fact that the interior states would not accept an uncontrolled Japanese migration.¹⁹

Final Report, *supra*, note 2, pp. 43-44. The Authority thereupon abandoned plans for assisting groups of evacuees in private colonization and temporarily put to one side plans for aiding the evacuees in obtaining private employment.²⁰ As an alternative the Authority "concentrated on establishment of Government-operated centers with sufficient capacity and facilities to accommodate the entire evacuee population." Sen. Doc. No. 96, *supra*, note 7, p. 4. Accordingly, it undertook to care for the basic needs of these people in the Relocation Centers, to promote as rapidly as possible the permanent resettlement of as many as possible in normal communities, and to provide indefinitely for those left at the Relocation Centers. An effort was made to segregate the loyal evacuees from the others. The leave program which we have dis-

¹⁷ Cf. the account of the meeting by General De Witt in the Final Report, *supra*, note 2, pp. 243-244.

¹⁸ And see the Fourth Interim Report of the Tolan Committee, H. R. Rep. No. 2124, 77th Cong., 2d Sess., p. 18.

cussed was put into operation and the resettlement program commenced.¹⁹

It is argued that such a planned and orderly relocation was essential to the success of the evacuation program; that, but for such supervision there might have been a dangerously disorderly migration of unwanted people to unprepared communities; that unsupervised evacuation might have resulted in hardship and disorder; that the success of the evacuation program was thought to require the knowledge that the federal government was maintaining control over the evacuated population except as the release of individuals could be effected consistently with their own peace and well-being and that of the nation; that although community hostility towards the evacuees has diminished, it has not disappeared and the continuing control of the Authority over the relocation process is essential to the success of the evacuation program. It is argued that supervised relocation, as the chosen method of terminating the evacuation, is the final step in the entire process and is a consequence of the first step taken. It is conceded that appellant's detention pending compliance with the leave regulations is not directly connected with the prevention of espionage and sabotage at the present time. But it is argued that Executive Order No. 9102 confers power to make regulations necessary and proper for controlling situations created by the exercise of the powers expressly conferred for protection against espionage and sabotage. The leave regulations are said to fall within that category.

First. We are of the view that Mitsuye Endo should be given her liberty. In reaching that conclusion we do not come to the underlying constitutional issues which have been argued. For we conclude that, whatever power the War Relocation Authority may have to detain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its leave procedure.

¹⁹ There were 108,503 evacuees transferred to Relocation Centers. Final Report, *supra*, note 2, p. 279. As of July 29, 1944, there were 28,911 on indefinite leave and 61,002 in the Relocation Centers other than Tule Lake. It was sought to assemble at Tule Lake those whose disloyalty was deemed to be established and those who persisted in a refusal to say they would be willing to serve in the armed forces of the United States on combat duty wherever ordered and to swear unqualified allegiance to the United States and forswear any form of allegiance to the Japanese Emperor or any other foreign government, power or organization. This group, together with minor children, totaled 18,684 on July 29, 1944. And see Hearings, Subcommittee on the National War Agencies Appropriation Bill for 1945, p. 611.

It should be noted at the outset that we do not have here a question such as was presented in *Ex parte Milligan*, 4 Wall. 2, or in *Ex parte Quirin*, 317 U. S. 1, where the jurisdiction of military tribunals to try persons according to the law of war was challenged in *habeas corpus* proceedings. Mitsuye Endo is detained by a civilian agency, the War Relocation Authority, not by the military. Moreover, the evacuation program was not left exclusively to the military; the Authority was given a large measure of responsibility for its execution and Congress made its enforcement subject to civil penalties by the Act of March 21, 1942. Accordingly, no questions of military law are involved.

Such power of detention as the Authority has stems from Executive Order No. 9066. That order is the source of the authority²⁰ delegated by General De Witt in his letter of August 11, 1942. And Executive Order No. 9102 which created the War Relocation Authority purported to do no more than to implement the program authorized by Executive Order No. 9066.

We approach the construction of Executive Order No. 9066 as we would approach the construction of legislation in this field. That Executive Order must indeed be considered along with the Act of March 21, 1942, which ratified and confirmed it (*Hirabayashi v. United States*, *supra*, pp. 87-91) as the Order and the statute together laid such basis as there is for participation by civil agencies of the federal government in the evacuation program. Broad powers frequently granted to the President or other executive officers by Congress so that they may deal with the exigencies of war time problems have been sustained.²¹ And the Constitution when it committed to the Executive and to Congress the exercise of the war power necessarily gave them wide scope for the exercise of judgment and discretion so that war might be waged effectively and successfully. *Hirabayashi v. United States*, *supra*, p. 93. At the same time, however, the Constitution is as specific in its enumeration of many of the civil rights of the individual as it is in its enumeration of the powers of his govern-

²⁰ Insofar as Public Proclamation No. WD 1, dated August 13, 1942, *supra*, note 3, might be deemed relevant, it is not applicable here since the Relocation Centers with which we are presently concerned were within the Western Defense Command.

²¹ See, for example, *United States v. Chemical Foundation*, 272 U. S. 1, 12; *United States v. Curtiss-Wright Corp.*, 299 U. S. 304; *Yakus v. United States*, 321 U. S. 414; *Bowles v. Willingham*, 321 U. S. 503.

ment. Thus it has prescribed procedural safeguards surrounding the arrest, detention and conviction of individuals. Some of these are contained in the Sixth Amendment, compliance with which is essential if convictions are to be sustained. *Tot v. United States*, 319 U. S. 463. And the Fifth Amendment provides that no person shall be deprived of liberty (as well as life or property) without due process of law. Moreover, as a further safeguard against invasion of the basic civil rights of the individual it is provided in Art. I, Sec. 9 of the Constitution that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." See *Ex parte Milligan, supra*.

We mention these constitutional provisions not to stir the constitutional issues which have been argued at the bar but to indicate the approach which we think should be made to an Act of Congress or an order of the Chief Executive that touches the sensitive area of rights specifically guaranteed by the Constitution. This Court has quite consistently given a narrower scope for the operation of the presumption of constitutionality when legislation appeared on its face to violate a specific prohibition of the Constitution.²² We have likewise favored that interpretation of legislation which gives it the greater chance of surviving the test of constitutionality.²³ Those analogies are suggestive here. We must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. In interpreting a war-time measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.

The Act of March 21, 1942, was a war measure. The House Report (H. Rep. No. 1906, 77th Cong., 2d Sess., p. 2) stated:

²² *Stromberg v. California*, 283 U. S. 359; *Lovell v. Griffin*, 303 U. S. 444; *Hague v. Committee for Industrial Organization*, 307 U. S. 496; *Schneider v. State*, 308 U. S. 147; *Cantwell v. Connecticut*, 310 U. S. 296.

²³ *United States v. Shreveport Grain & Elevator Co.*, 287 U. S. 77, 82; *Interstate Commerce Commission v. Ored.*, *Washington R. & N. Co.*, 288 U. S. 14, 40; *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 348; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30; *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 351-352. ☉

"The necessity for this legislation arose from the fact that the safe conduct of the war requires the fullest possible protection against either espionage or sabotage to national defense material, national defense premises, and national defense utilities." That was the precise purpose of Executive Order No. 9066, for, as we have seen, it gave as the reason for the exclusion of persons from prescribed military areas the protection of such property "against espionage and against sabotage". And Executive Order No. 9102 which established the War Relocation Authority did so, as we have noted, "in order to provide for the removal from designated areas of persons whose removal is necessary in the interests of national security." The purpose and objective of the Act and of these orders are plain. Their single aim was the protection of the war effort against espionage and sabotage. It is in light of that one objective that the powers conferred by the orders must be construed.

Neither the Act, nor the orders use the language of detention. The Act says that no one shall "enter, remain in, leave, or commit any act" in the prescribed military areas contrary to the applicable restrictions. Executive Order No. 9066 subjects the right of any person "to enter, remain in, or leave" those prescribed areas to such restrictions as the military may impose. And apart from those restrictions the Secretary of War is only given authority to afford the evacuees "transportation, food, shelter, and other accommodations." Executive Order No. 9102 authorizes and directs the War Relocation Authority "to formulate and effectuate a program for the removal" of the persons covered by Executive Order No. 9066 from the prescribed military areas and "for their relocation, maintenance, and supervision." And power is given the Authority to make regulations "necessary or desirable to promote effective execution of such program." Moreover, unlike the case of curfew regulations (*Hirabayashi v. United States*, *supra*), the legislative history of the Act of March 21, 1942, is silent on detention. And that silence may have special significance in view of the fact that detention in Relocation Centers was no part of the original program of evacuation but developed later to meet what seemed to the officials in charge to be mounting hostility to the evacuees on the part of the communities where they sought to go.

We do not mean to imply that detention in connection with no phase of the evacuation program would be lawful. The fact that the Act and the orders are silent on detention does not of course mean that any power to detain is lacking. Some such power might indeed be necessary to the successful operation of the evacuation program. At least we may so assume. Moreover, we may assume for the purposes of this case that initial detention in Relocation Centers was authorized. But we stress the silence of the legislative history and of the Act and the Executive Orders on the power to detain to emphasize that any such authority which exists must be implied. If there is to be the greatest possible accommodation of the liberties of the citizen with this war measure, any such implied power must be narrowly confined to the precise purpose of the evacuation program.

A citizen who is concededly loyal presents no problem of espionage or sabotage. Loyalty is a matter of the heart and mind not of race, creed, or color. He who is loyal is by definition not a spy or a saboteur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized.

Nor may the power to detain an admittedly loyal citizen or to grant him a conditional release be implied as a useful or convenient step in the evacuation program, whatever authority might be implied in case of those whose loyalty was not conceded or established. If we assume (as we do) that the original evacuation was justified, its lawful character was derived from the fact that it was an espionage and sabotage measure, not that there was community hostility to this group of American citizens. The evacuation program rested explicitly on the former ground not on the latter as the underlying legislation shows. The authority to detain a citizen or to grant him a conditional release as protection against espionage or sabotage is exhausted at least when his loyalty is conceded. If we held that the authority to detain continued thereafter, we would transform an espionage or sabotage measure into something else. That was not done by Executive Order No. 9066, or by the Act of March 21, 1942, which ratified it. What they did not do we cannot do. Detention which furthered the campaign against espionage and sabotage would be one thing. But detention which has no relationship to that campaign is of a

dissect character. Community hostility even to loyal evacuees may have been (and perhaps still is) a serious problem. But if authority for their custody and supervision is to be sought on that ground, the Act of March 21, 1942, Executive Order No. 9066, and Executive Order No. 9102, offer no support. And none other is advanced.²⁴ To read them that broadly would be to assume that the Congress and the President intended that this discriminatory action should be taken against these people wholly on account of their ancestry even though the government conceded their loyalty to this country. We cannot make such an assumption. As the President has said of these loyal citizens:

"Americans of Japanese ancestry, like those of many other ancestries, have shown that they can and want to, accept our institutions and work loyally with the rest of us, making their own valuable contribution to the national wealth and well-being. In vindication of the very ideals for which we are fighting this war it is important to us to maintain a high standard of fair, considerate, and equal treatment for the people of this minority as of all other minorities." Sen. Doe. No. 96, *supra*, note 7, p. 2.

²⁴ It is argued, to be sure, that there has been Congressional ratification of the detention of loyal evacuees under the leave regulations of the Authority through the appropriation of sums for the expenses of the Authority. 57 Stat. 533; P. L. 139, 78th Cong., 1st Sess., approved July 12, 1943 and P. L. 372, 78th Cong., 2d Sess., approved June 28, 1944. It is pointed out that the regulations and procedures of the Authority were disclosed in reports to the Congress and in Congressional hearings. See, for example, Sen. Doe. No. 96, *supra*, note 7; Report and Minority Views of the Special Committee on Un-American Activities on Japanese War Relocation Centers, H. Rep. No. 717, 78th Cong., 1st Sess., pp. 23-26; Hearings, Subcommittee of the Senate Military Affairs Committee on S. 444, 78th Cong., 1st Sess., pp. 45-46; Japanese War Relocation Centers, Subcommittee Report on S. 444 and S. 101 and 111, 78th Cong., 1st Sess., pp. 4-5 *et seq.* And it is shown that the leave program of the Authority was mentioned both in the House and Senate committee hearings on the 1944 Appropriation Act (Hearings, Subcommittee of the House Committee on Appropriations, National War Agencies Appropriation Bill for 1944, 78th Cong., 1st Sess., pp. 698, 699, 710; Hearings of the Senate Subcommittee on Appropriations, National War Agencies Appropriation Bill for 1944, 78th Cong., 1st Sess., p. 382) and on the floor of the House prior to passage of the 1944 Act. 89 Cong. Rec. p. 5983-5985. Congress may of course do by ratification what it might have authorized. *Swayne & Hoyt, Ltd. v. United States*, 301 U. S. 297, 301-302. And ratification may be effected through appropriation acts. *Isbrandtsen-Moller Co. v. United States*, 300 U. S. 139, 147; *Brooks v. Dewar*, 313 U. S. 354, 361. But the appropriation must plainly show a purpose to bestow the precise authority which is claimed. We can hardly deduce such a purpose here where a lump appropriation was made for the overall program of the Authority and no sums were earmarked for the single phase of the total program which is here involved. Congress may support the effort to take care of these evacuees without ratifying every phase of the program.

Mitsuye Endo is entitled to an unconditional release by the War Relocation Authority.

Second. The question remains whether the District Court has jurisdiction to grant the writ of *habeas corpus* because of the fact that while the case was pending in the Circuit Court of Appeals appellant was moved from the Tule Lake Relocation Center in the Northern District of California where she was originally detained, to the Central Utah Relocation Center in a different district and circuit.

That question is not colored by any purpose to effectuate a removal in evasion of the *habeas corpus* proceedings. It appears that appellant's removal to Utah was part of a general segregation program involving many of these people and was in no way related to this pending case. Moreover, there is no suggestion that there is no one within the jurisdiction of the District Court who is responsible for the detention of appellant and who would be an appropriate respondent. We are indeed advised by the Acting Secretary of the Interior²⁵ that if the writ issues and is directed to the Secretary of the Interior or any official of the War Relocation Authority (including an assistant director whose office is at San Francisco, which is in the jurisdiction of the District Court), the corpus of appellant will be produced and the court's order complied with in all respects. Thus it would seem that the case is not moot.

In *United States ex rel. Inness v. Crystal*, 319 U. S. 755, the relator challenged a judgment of court martial by *habeas corpus*. The District Court denied his petition, and the Circuit Court of Appeals affirmed that order. After that decision and before his petition for certiorari was filed here, he was removed from the custody of the Army to a federal penitentiary in a different district and circuit. The sole respondent was the commanding officer. Only an order directed to the warden of the penitentiary could effectuate his discharge and the warden as well as the prisoner was outside the territorial jurisdiction of the District Court. We therefore held the cause moot. There is no comparable situation here.

The fact that no respondent was ever served with process or appeared in the proceedings is not important. The United States resists the issuance of a writ. A cause exists in that state of the

²⁵ In a letter dated October 13, 1944 to the Solicitor General and filed here.

proceedings and an appeal lies from denial of a writ without the appearance of a respondent. *Ex parte Milligan*, *supra*, p. 112; *Ex parte Quirin*, 317 U. S. 1, 24.

Hence, so far as presently appears, the cause is not moot and the District Court has jurisdiction to act unless the physical presence of appellant in that district is essential.

We need not decide whether the presence of the person detained within the territorial jurisdiction of the District Court is prerequisite to filing a petition for a writ of *habeas corpus*. See *In re Bole*, 48 Fed. 75; *Ex parte Gouyet*, 175 Fed. 230, 233; *United States v. Day*, 50 F. 2d 816, 817; *United States v. Schlöfeldt*, 136 F. 2d 935, 940. But see *Tippitt v. Wood*, 140 F. 2d 689, 693. We only hold that the District Court acquired jurisdiction in this case and that the removal of Mitsuye Endo did not cause it to lose jurisdiction where a person in whose custody she is remains within the district.

There are expressions in some of the cases which indicate that the place of confinement must be within the court's territorial jurisdiction in order to enable it to issue the writ. See *In re Bole*, *supra*, p. 76; *Ex parte Gouyet*, *supra*; *United States v. Day*, *supra*; *United States v. Schlöfeldt*, *supra*. But we are of the view that the court may act if there is a respondent within reach of its process who has custody of the petitioner. As Judge Cooley stated in *In the Matter of Samuel W. Jackson*, 15 Mich. 417, 439-440:

"The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent;"

And see *United States v. Davis*, 5 Cranch C. C. 622, Fed. Cas. No. 14,926; *Ex parte Fang Yim*, 134 Fed. 938; *Ex parte Ng Quang Ming*, 135 Fed. 378, 379; *Sanders v. Allen*, 100 F. 2d 717, 719; *Rivers v. Mitchell*, 57 Ia. 193, 195; *People v. New York Asylum*, 57 App. Div. 383, 384; *People v. New York Asylum*, 58 App. 133, 134. The statute upon which the jurisdiction of the District Court in *habeas corpus* proceedings rests (Rev. Stat. § 752, 28 U. S. C. § 452) gives it power "to grant writs of habeas corpus for the

purpose of an inquiry into the cause of restraint of liberty.²⁶ That objective may be in no way impaired or defeated by the removal of the prisoner from the territorial jurisdiction of the District Court. That end may be served and the decree of the court made effective if a respondent who has custody of the prisoner is within reach of the court's process even though the prisoner has been removed from the district since the suit was begun.²⁷

The judgment is reversed and the cause is remanded to the District Court for proceedings in conformity with this opinion.

Reversed.

²⁶ The entire section provides:

"The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit, that a district judge has within his district; and the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."

The last clause was added by § 6 of the Act of February 13, 1925, 43 Stat. 940. But we find no indication that it was added to change the scope of jurisdiction in habeas corpus proceedings. On its face it is no more than a recording requirement.

²⁷ Cf. Rule 45(1) of this Court which provides: "Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed."

Mr. Justice MURPHY, concurring.

I join in the opinion of the Court, but I am of the view that detention in Relocation Centers of persons of Japanese ancestry regardless of loyalty is not only unauthorized by Congress or the Executive but is another example of the unconstitutional resort to racism inherent in the entire evacuation program. As stated more fully in my dissenting opinion in *Korematsu v. United States*, decided this day, racial discrimination of this nature bears no reasonable relation to military necessity and is utterly foreign to the ideals and traditions of the American people.

Moreover, the Court holds that Mitsuye Endo is entitled to an unconditional release by the War Relocation Authority. It appears that Miss Endo desires to return to Sacramento, California, from which Public Proclamations Nos. 7 and 11, as well as Civilian Exclusion Order No. 52, still exclude her. And it would seem to

me that the "unconditional" release to be given Miss Endo necessarily implies "the right to pass freely from state to state," including the right to move freely into California. *Twining v. New Jersey*, 211 U. S. 78, 97; *Crandall v. Nevada*, 6 Wall. 35. If, as I believe, the military orders excluding her from California were invalid at the time they were issued, they are increasingly objectionable at this late date, when the threat of invasion of the Pacific Coast and the fears of sabotage and espionage have greatly diminished. For the Government to suggest under these circumstances that the presence of Japanese blood in a loyal American citizen might be enough to warrant her exclusion from a place where she would otherwise have a right to go is a position I cannot sanction.

Mr. Justice ROBERTS.

I concur in the result but I cannot agree with the reasons stated in the opinion of the court for reaching that result.

As in *Korematsu v. United States*, No. 22, of this Term, the court endeavors to avoid constitutional issues which are necessarily involved. The opinion, at great length, attempts to show that neither the executive nor the legislative arm of the Government authorized the detention of the relator.

1. With respect to the executive, it is said that none of the executive orders in question specifically referred to detention and the court should not imply any authorization of it. This seems to me to ignore patent facts. As the opinion discloses, the executive branch of the Government not only was aware of what was being done but in fact that which was done was formulated in regulations and in a so-called handbook open to the public. I had supposed that where thus overtly and avowedly a department of the Government adopts a course of action under a series of official regulations the presumption is that, in this way, the department asserts its belief in the legality and validity of what it is doing. I think it inadmissible to suggest that some inferior public servant exceeded the authority granted by executive order in this case. Such a basis of decision will render easy the evasion of law and the violation of constitutional rights, for when conduct is called in question the obvious response will be that, however much the superior executive officials knew, understood, and approved the

conduct of their subordinates, those subordinates in fact lacked a definite mandate so to act. It is to hide one's head in the sand to assert that the detention of relator resulted from an excess of authority by subordinate officials.

2. As the opinion states, the Act of March 21, 1942, said nothing of detention or imprisonment, nor did Executive Order No. 9066 of date February 19, 1942, but I cannot agree that when Congress made appropriations to the Relocation Authority, having before it the reports, the testimony at committee hearings, and the full details of the procedure of the Relocation Authority was exposed in Government publications, these appropriations were not a ratification and an authorization of what was being done. The cases cited in footnote No. 24 of the opinion do not justify any such conclusion. The decision now adds an element never before thought essential to congressional ratification, namely, that if Congress is to ratify by appropriation any part of the programme of an executive agency the bill must include a specific item referring to that portion of the programme. In other words, the court will not assume that Congress ratified the procedure of the authorities in this case in the absence of some such item as this in the appropriation bill:—"For the administration of the conditional release and parole programme in force in relocation centers." In the light of the knowledge Congress had as to the details of the programme, I think the court is unjustified in straining to conclude that Congress did not mean to ratify what was being done.

3. I conclude, therefore, that the court is squarely faced with a serious constitutional question,—whether the relator's detention violated the guarantees of the Bill of Rights of the federal Constitution and especially the guarantee of due process of law. There can be but one answer to that question. An admittedly loyal citizen has been deprived of her liberty for a period of years. Under the Constitution she should be free to come and go as she pleases. Instead, her liberty of motion and other innocent activities have been prohibited and conditioned. She should be discharged.